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Supreme Court, U. S.
FILED

JUL 16 1973

IN THE
Supreme Court of the United States
October Term, 1972

No. 72-851

**THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known
as the ONEIDA NATION OF NEW YORK, also known as the
ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN
NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF
INDIANS OF WISCONSIN, INC.,**

Petitioners,

v.

**THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF
MADISON, NEW YORK,**

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

**PETITION FOR CERTIORARI FILED DECEMBER 9, 1972
CERTIORARI GRANTED JUNE 4, 1973**

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IN THE
United States Court of Appeals [A]
For the Second Circuit

No. _____

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known
as the ONEIDA NATION OF NEW YORK, also known as the
ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN
NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF
INDIANS OF WISCONSIN, INC.,

Plaintiffs-Appellants,

vs.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF
MADISON, NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 70-CV-35

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COMPLAINT, Filed 2-5-70.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[1]

THE ONEIDA INDIAN NATION OF NEW YORK STATE,
also known as the ONEIDA NATION OF NEW YORK,
also known as the ONEIDA INDIANS OF NEW YORK,
and THE ONEIDA INDIAN NATION OF WISCONSIN,
also known as the ONEIDA TRIBE OF INDIANS OF
WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE
COUNTY OF MADISON, NEW YORK, Defendants.

Civil Action No. 70-CV-35

Plaintiffs, for their complaint against defendants, allege
and show that:

1. Plaintiff, THE ONEIDA INDIAN NATION OF NEW YORK STATE, is an Indian Nation or Tribe with its principal Reservation and situs in the Counties of Oneida and Madison, State of New York. Plaintiff, THE ONEIDA INDIAN NATION OF WISCONSIN, is an incorporated Indian Nation or Tribe with its principal Reservation and situs in the State of Wisconsin. Defendants are Counties of the State of New York.
2. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00. Jurisdiction is conferred by diversity of citizenship.
3. From time immemorial, down to the time of the American Revolutionary War, the plaintiffs owned some 6,000,000 acres of land in New York State, as shown on the map annexed as Exhibit A. In the American Revolutionary War, the plaintiffs fought on the side of the Thirteen Colonies and rendered valuable and material support, which helped the Colonies attain victory and independence.
4. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article

Complaint, Filed 2-5-70.

IX of the Articles of Confederation and under Article L, Section 8, of the United States Constitution. Under this power, treaties were made

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with the Oneidas, which read in part as follows:

Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States. . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

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Treaty with Oneida, Tuscarora and Stockbridge Indians -
Oneida 1974

"Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

5. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 U.S.C.A. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

[3]

"Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Here well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government consideres itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Complaint, Filed 2-5-70.

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

"The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

6. Plaintiffs hereby invoke Section 177 of the Federal Law, Title 25 U.S. Code, which reads as follows:

"Section 177. Purchases or Grants of lands
from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claims to land within such State, which shall be extinguished by treaty. R.S. Section 2116."

7. Plaintiffs hereby invoke Section 194 of the Federal Indian Law, Title 25 U.S. Code, which reads as follows:

"Section 194. Trial of right of property; burden
of proof

Complaint, Filed 2-5-70.

their land and induced them to sell it for an unconscionable and inadequate price.

17. New York State also knew and admitted that federal law forbade such land acquisitions, since it recognized the need for U.S. consent in connection with a further land purchase from plaintiffs in 1798 and in connection with four other acquisitions of Indian lands from 1797-1802.

18. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded became the property of the Counties

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of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of said occupancy plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least \$10,000, exclusive of costs and interest.

19. By bringing this action, plaintiffs do not waive or relinquish any right or action in respect of its lands in New York State as shown on Exhibit A.

20. Both the federal and state treaties provide that the Oneida Indians are to ask the help of the United States and the State before taking any action on their own. The plaintiffs have asked the help of both the federal and state governments and such help has been refused.

21. It has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors. The plaintiffs bring this action against defendants only because all other avenues of redress have been closed to them.

Wherefore, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS

Complaint, Filed 2-5-70.

(\$10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By _____

**Attorneys for Plaintiffs
Office and P. O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121**

—

Exhibit A — Map annexed to Complaint.

[7]



**Exhibit B — Treaty of 1788
annexed to Complaint.**

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Fort Stanwix
// **STATE TREATY WITH THE ONEIDA INDIANS, 1788.**

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommiedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas — it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First. The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tiannaderha or Unadilla River; thence from the said point of intersection due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent

Exhibit B - Treaty of 1788 annexed to Complaint.

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[ASSEMBLY,

frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a

Exhibit B - Treaty of 1788 annexed to Complaint.

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further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation, and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTÉ
KANAGHGWÉYA

Exhibit B - Treaty of 1788 annexed to Complaint.

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[ASSEMBLY,

PETER OTSIQUETTE
 THAGHNITONGO
 THONIGWEAGHSHALE
 TEHEAND' YAKHON
 OGISTALALE *alias* HANYURRY
 OTSETOGON
 TEYOHAGWEANDA
 ONEYANHA *alias* BEECH TREE
 THAGHNEGHTOLIS *alias* HENDRICK
 S' HONOUGHLEYO *alias* ANTGONY
 THAGTAGHGUISEA
 HANAGHSALILGH
 GAGHSAWEDA
 TYAGHSWEANGALOLIS *alias* DOMINE PETER
 JOHEGHSLISHEA *alias* DANIEL
 THANIGEANDAGAYON
 ALAWISTONIS *alias* BLACKSMITH
 KEANYAKO *alias* DAVID
 KAKIKTOTON
 SAGOYONTHA
 HANNAH SODOLK
 TEHOUGHNIHALK HANWAGALET
 KASKONGHGWEA KANWAGALET
 HONONWAYELE
 SKENONDONGH
 GEORGE CLINTON
 WM FLOYD
 EZRA L'HOMMEDIEU
 RICHARD VARICK
 SAMUEL JONES
 EGBERT BENSON
 PETER GANSEVOORT, JUNR.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)
 Witnesses present.

Exhibit B - Treaty of 1788 annexed to Complaint.

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The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneida may make leases as aforesaid) in the third line of the fourth article, being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleeker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,

Miss'y & Interpreter.

J. B. CHRS. DEST,

Trys.

ABM. ROSEKRANTZ,

SIMEON DEWITT,

Surv. Genl.,

SAMUEL LATHAM MITHCELL,

JOHN TAYLER,

WM. COLBRATH.

Know all Men by these presents that We the Sachems Warriors and Women of the Oneida Nation of Indians in full Council assembled Have nominated constituted and appointed and by these presents Do nominate constitute and appoint Our Brothers of the said nation Peter Hanoughgwinia John Shawondo, Martinus Atshinha, Paul Otshetogon of the Wolf Clan, Anthony Shononghriyo William Taghtaghvijiye John Onontio Thomas Tehohearitba of the Turtle Clan and Joseph Ogeaghratarighahen Nicholas Sagovakarongo Nicholas Tehotskarion and Kamyoton of the Bear Clan Our lawful deputies and attorneys for us and in Our name and in our behalf to treat with the Commissioners appointed by an act of the Legislature of the State of New York entitled "an act for the better support of the Oneida Onondago and Cayuga Indians and other purposes therein mentioned" and to bargain sell release and confirm unto the People of the said State all our right title interest Claim and demand whatsoever of in and to such part or parts of the lands within said State

[Assembly, No. 51.]

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**Exhibit C — Treaty of 1795
annexed to Complaint**

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[ASSEMBLY,

// This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread, Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attorneys authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part :

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner.

Exhibit C - Treaty of 1795 annexed to Complaint.

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thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two

Exhibit C - Treaty of 1795 annexed to Complaint.

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[ASSEMBLY;

Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to

Exhibit C - Treaty of 1795 annexed to Complaint.

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convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained in the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith of part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

JOHN ^{his}
x ^{mark} SKANONDO [L. s.]

WILLIAM ^{his}
x ^{mark} TAGHTAGHGIVESIRE [L. s.]

ANTHONY ^{his}
x ^{mark} SHONONGHIYO [L. s.]

JACOB REED [L. s.]

MARTINUS ^{his}
x ^{mark} ALSHINSHA [L. s.]

PETER ^{his}
x ^{mark} BREAD [L. s.]

JACOB ^{his}
x ^{mark} DOXTADER [L. s.]

THOMAS ^{his}
x ^{mark} TEHOHEARIETHA [L. s.]

CHRISTIAN ^{his}
x ^{mark} KANYARODON [L. s.]

JOHN ^{his}
x ^{mark} DENNY [L. s.]

JOSEPH ^{his}
x ^{mark} HOT ASHES [L. s.]

THANJOTON ^{his}
x ^{mark} [L. s.]

NICHOLAS x JEHOTSKARIAON [L. s.]

MOSES ^{his}
x ^{mark} CHAHAGIGHTE [L. s.]

PETER ^{his}
x ^{mark} TEKAWIGATIGHRON [L. s.]

Exhibit C - Treaty of 1795 annexed to Complaint.

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[ASSEMBLY,

EZEKIEL	^{his} x _{mark}	SHAWSTAGOWA	[L. a.]
JOHN JOURDAN			[L. a.]
ELEAZAR	^{his} x _{mark}	SHANEWIS	[L. a.]
PAUL	^{his} x _{mark}	TEHONEVATASE	[L. a.]
ABRAHAM	^{his} x _{mark}	ONEGERENGHTE	[L. a.]
PH. SCHUYLER			[L. a.]
JOHN CANTINE			[L. a.]
D. BROOKS			[L. a.]

Sealed and delivered in the presence of.

NOTE. The words "four miles distant from the Eastern Boundary of the Tract so appropriated as aforesaid, thence Northerly by strait lines parallel to the Eastern boundary "lines of the Lands so appropriated and and keeping four miles distant therefrom until it reaches a place," were interlined before Execution—interlined between the twelfth & thirteenth Lines, between the words *Point* and *four*—the words *appropriated* throughout the whole of the above Instrument written on Erasures before the Execution thereof.

EPH^m VAN VEORTEN,
JAMES DEAN.

STATE OF NEW YORK

Be it remembered that on the Sixteenth day of September One thousand seven hundred and ninety five personally appeared before me Egbert Benson Esquire one of the Judges of the Supreme Court of the said State James Deane one of the within subscribing Witnesses who being duly sworn did depose that he saw Philip Schuyler, John Cantine and David Brooks the agents therein named and the twenty Indians whose names are thereto subscribed seal &

Exhibit C - Treaty of 1795 annexed to Complaint.

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deliver the within Indenture, and that he the deponent subscribed his name as a Wittness thereto, and saw Ephraim Van Vechten the other Wittness also subscribe his name thereto, and I having Inspected the same and not finding any erasures or Interlineations therein other than those noted to have been made before Execution do allow it to be Recorded.

EGBT BENSON—

The preceding Instrument is a true Copy of the Original words *first above written* last line page 177 and words "*Ph: Schuyler (L S) John*" 10th line page 178 written on Erasures and word *said* at 11th line page 174 interlined Compared therewith this 28th day of March 1796 By Me

LEWIS A. SCOTT,

Secretary

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York.....

The said Indians having in the month of March last Proposed to the Governor of the said State to cede the Lands herein after described, for the compensation herein after mentioned—and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as fellows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 51 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newagghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation—And also the same

[Assembly, No. 51.]

AMENDED COMPLAINT, Filed 7-29-70.

[22]

(SAME TITLE).

Plaintiffs hereby amend their complaint in the above-entitled action and allege and show as and for an alternate, separate, and distinct cause of action a new paragraph, "22", as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000.00, exclusive of costs and interest.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS (\$10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By s/ GEORGE C. SHATTUCK

Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

NOTICE OF MOTION TO DISMISS, Filed 11-12-70.

[23]

(SAME TITLE).

SIR:

PLEASE TAKE NOTICE, that upon the amended complaint herein and the annexed affidavit of William L. Burke, Esq., sworn to the 2nd day of November, 1970, a motion will be made at a Special term of this Court, to be held at the Federal Building in the City of Utica on the 23rd day of November, 1970, at ten o'clock a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for a judgment dismissing the amended complaint upon the following grounds:

1. The Court has no jurisdiction. Section 52 of the County Law states that the place of trial, when the County is a defendant, shall be in the county against which the action was brought. Further, the Court does not have jurisdiction of the subject matter on the ground of the diversity of citizenship, since one of the parties, plaintiff, The Oneida Indian Nation of New York State, are citizens of the same state as the defendants, County of Oneida and County of Madison.

2. The Complaint fails to set forth a cause of action.

[24]

3. It appears on the face of the plaintiffs' Complaint, a copy of which is attached hereto and marked Exhibit "A", that the claim asserted did not accrue, if in fact, it accrued at all, to the plaintiff within six years before the initiation of this action and, therefore, the action is barred by the statute of limitations.

4. The prolongation of the institution of the within suit by the plaintiffs is barred by laches.

5. The current owners of the land alleged to be

Notice of Motion to Dismiss, Filed 11-12-70.

withheld illegally from the plaintiffs have been held by their present occupants and their predecessors in title by adverse possession for over 150 years.

6. The defendant, County of Madison, as a bonafide purchaser for value of said premises without notices as to any alleged fraud involved in the purchase thereof from the plaintiffs and, therefore, is not a proper party in this action.

7. The plaintiffs' have not exhausted all of their remedies, since they presently have an identical claim pending against the United States of America before the Federal Indian Claims Commission.

8. Chapter 70 of the Laws of 1806 created the County of Madison, which originally was part of the County of Chenango. Section 8 of the Court of Claims Act became law in 1920 by chapter 922. That section stated that the State waived immunity from liability in an action and henceforward would assume liability and consented to have the same determined in accordance with the same rules and laws as applied to actions in the Supreme Court against individuals and corporations. The cause of action in the instant case arose many years before Section 8 of the Court of Claims Act became law.

[25]

9. There is no enabling act which permits the within plaintiffs' to institute the cause of action alleged in the plaintiffs' Complaint.

10. The controversey alleged in the Complaint actually would be against the United States of America, and/or the State of New York and not the County of Madison, since the County of Madison was not created until 1806, which date is subsequent to the alleged depravation of land owned by the plaintiffs' forebearers.

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Notice of Motion to Dismiss, Filed 11-12-70.

11. And for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that answering affidavits, if any, are to be served upon the undersigned at least five (5) days before the return date of this motion.

Dated: November ____, 1970.

**WILLIAM L. BURKE, ESQ.
Attorney for Defendant
County of Madison
Office & P.O. Address
29 Lebanon Street
Hamilton, New York 13346
Tel. (315) 824-3550**

TO:

**BOND, SCHOENECK & KING
Attorneys for Plaintiffs
Office & P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Tel. (315) 422-0121**

AFFIDAVIT OF WILLIAM L. BURKE IN SUPPORT OF MOTION TO DISMISS.

[26]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF MADISON) ss.:

WILLIAM L. BURKE, being duly sworn, deposes and says:

1. I am the Madison County Attorney and as such I am familiar with all the records and proceedings of this action.

2. As more fully appears from the amended complaint, a copy of which is annexed hereto, this action is essentially an action for money damages predicated upon the alleged breach by the defendants' of several federal treaties and sections of the United States code.

3. This action was commenced by the service of a Summons and Complaint upon the defendant, County of Madison, on the 9th day of February, 1970. Through a series of extensions of time to answer, granted by the attorney for the plaintiffs' to the attorneys for the defendants, issue has not been joined and the time to answer has not expired.

4. More particularly and in support of the Motion to Dismiss upon the ground:

1. The Court has no jurisdiction. Section 52 of the County Law states that the place of trial, when the County is a defendant, shall be in the county against which

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the action was brought. Further, the Court does not have jurisdiction of the subject matter on the ground of the diversity of citizenship, since one of the parties, plaintiff, The Oneida Indian Nation of New York State, are citizens

**Affidavit of William L. Burke in Support
of Motion to Dismiss.**

of the same state as the defendants, County of Oneida, and County of Madison.

2. The Complaint fails to set forth a cause of action.

3. It appears on the fact of the plaintiffs' Complaint, a copy of which is attached hereto and marked Exhibit "A", that the claim asserted did not accrue, if in fact, it accrued at all, to the plaintiff within six years before the initiation of this action and, therefore, the action is barred by the statute of limitations.

4. The prolongation of the institution of the within suit by the plaintiffs' is barred by laches.

5. The current owners of the land alleged to be withheld illegally from the plaintiffs have been held by their present occupants and their predecessors in title by adverse possession for over 150 years.

6. The defendant, County of Madison, as a bonafide purchaser for value of said premises without notices as to any alleged fraud involved in the purchase thereof from the plaintiffs and, therefore, is not a proper party in this action.

7. The plaintiffs' have not exhausted all of their remedies, since they presently have an identical claim pending against the United States of America before the Federal Indian Claims Commission.

[28]

8. Chapter 70 of the Laws of 1806 created the County of Madison, which originally was part of the County of Chenango. Section 8 of the Court of Claims Act became law in 1920 by chapter 922. That section stated that the State waived immunity from liability in an action and henceforward would assume liability and consented to have the same determined in accordance with the same rules and laws as applied to actions in the Supreme Court against

**Affidavit of William L. Burke in Support
of Motion to Dismiss.**

individuals and corporations. The cause of action in the instant case arose many years before Section 8 of the Court of Claims Act became law.

9. There is no enabling act which permits the within plaintiffs' to institute the cause of action alleged in the plaintiffs' Complaint.

10. The controversy alleged in the Complaint actually would be against the United States of America, and/or the State of New York and not the County of Madison, since the County of Madison was not created until 1806, which date is subsequent to the alleged deprivation of land owned by the plaintiffs' forebearers.

11. And for such other and further relief as to this Court may seem just and proper.

s/ WILLIAM L. BURKE
William L. Burke
Madison County Attorney

(Sworn to November 2, 1970).

**AFFIDAVIT OF JACOB THOMPSON AND GEORGE
C. SHATTUCK, Filed 11-18-70.**

[48]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JACOB THOMPSON, of Route 11-A, Nedrow, New York,
and GEORGE C. SHATTUCK, of 210 Sedgwick Drive,
Syracuse, New York, being duly sworn, depose and say:

1. This is a joint affidavit based on extensive re-
search by deponents; in the case of deponent, JACOB
THOMPSON, research over at least a ten year period on
the historical and legal status of the Oneida Indians.

2. JACOB THOMPSON is an Oneida Indian and is cur-
rently the President of the Oneida Indian Nation of New
York. GEORGE C. SHATTUCK is one of the attorneys for
the Oneida Indians under a retainer contract approved by
the Department of Interior.

3. This affidavit shows the factual background of the
Oneida Indians' claim against Oneida and Madison Counties.

4. After the Revolutionary War, in which the Oneida
Indians fought on the side of the Colonies, the Oneidas own-
ed in good fee title between 4,000,000 and 6,000,000 acres
of land in what is now New York State. (See attached map
published by the New York State Museum, Exhibit "I".)
Thereafter this land

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was acquired from them by the State for completely unfair
and inadequate consideration; and in many cases in viola-
tion of the Federal Constitution, Federal Treaties, and
the Federal Indian Law, currently Section 177 of 25 USCA.

5. A state can be sued only with its own consent and
the 11th Amendment to the United States Constitution bars
suit against a state in federal courts. Therefore, the

Affidavit of Jacob Thompson and George C. Shattuck,
Filed 11-18-70.

Oneida Indians have never had a forum in which to present their claim against the State. There is, however, no bar to a suit against a political subdivision of a state, such as a County. Further, until recently the courts of New York have held that an Indian Nation had no status to sue in New York courts.

POST REVOLUTIONARY WAR

6. History can sometimes best be understood in terms of geography. What happened to the Oneidas is a good example: They were in the way. The western boundary of the white man's domain was fixed by the Treaty of 1768 at a line roughly north and south from Rome, New York. After the Revolution the move West was irresistible and the fact that the Oneidas had helped New York and the other Colonies during the Revolutionary War did them no good. Neither laws nor fair play stopped the ultimate loss of possession of the Oneida Reservation.

7. In 1783 the New York Legislature empowered commissioners to try to get the Oneidas to leave their lands and move West to land then owned by the Senecas. "The Treaty of Fort Stanwix", by Henry S. Manley, p. 28. Later in 1783 General George Washington visited the Oneidas to investigate their complaints and as a result of his visit, the Continental Congress delegated to its commissioners power to effect a peace treaty with the warring Indians and to reassure the Oneidas and Tuscaroras as to their lands. Manley, pp. 44, 46.

This treaty was effected in 1784 at Ft. Stanwix. [50]

With the U.S. delegation were James Madison and the Marquis de Lafayette. Lafayette, who had great influence with the Indians, told them:

"In selling your lands, do not consult the keg of rum and give them away to the first adventurer, but let

**Affidavit of Jacob Thompson and George C. Shattuck,
Filed 11-18-70.**

the American chiefs and yours, united around the fire, settle on reasonable terms." History of Oneida County (1878) p. 63.

In this treaty, the United States promised that "The Oneida and Tuscarora Nations shall be secured in the possession of lands in which they are settled." Article 2.

A look at a topographic map of New York State shows why the fledgling federal government failed to keep its promise. Both the Northern and Southern parts of the State are hilly with most valleys running North and South. In terms of canals, ox-wagons and travel afoot, the Mohawk River Valley and its continuation west along the southerly shore of Oneida Lake was the only gateway to the West. It is not just chance that the Erie and Barge Canals, the main railroad tracks and roads, and the New York Thruway all follow roughly the same route. The old Genesee Road, now U.S. Route #5, was a former Indian trail across the heartland of the Oneidas, to their capitol at Oneida Castle, New York.

It was perhaps inevitable that the small Oneida Nation would bow before the mighty destiny of New York State. The question remains before us as to what may be done to rectify the great wrong done.

THE LAND CESSIONS

8. The 1784 treaty between the Iroquois Nation and the United States was proclaimed on October 22, 1784. Just eight months later, June 28, 1785, the Oneidas sold to New York State about 300,000 acres in what is now Broome and Chenango Counties for \$11,500 -- about \$.04 per acre. In 1788 the Oneidas sold to the State all the rest of their lands, say, 4,000,000 acres,

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excepting a tract in Madison and Oneida Counties, for \$15,500. The excepted tract was denoted their Reservation

Affidavit of Jacob Thompson and George C. Shattuck,
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and included about 300,000 acres. The 1788 price was about \$.003 or \$.004 per acre. All signatures of Indians on these treaties were made with an "X". Exhibit II is a map of such Reservation, including the land which Peter Smith tried to lease from the Oneidas.

9. In 1793 the New York Legislature (16th Sess. Chap. 51) authorized a committee to deal with the Oneidas for purchase of the rest of their land for an annuity not exceeding \$5.00 per square mile, or \$.008 per acre. This represents a principal price of \$.14 per acre, when developers were selling land at \$1.50 per acre and up.

10. In 1795 the Oneidas "sold" a large part of their Reservation to the State for an annuity of \$.03 per acre forever. It is this tract which is the subject of this action and which is outlined in red on Exhibit II. This annuity figures out to a price of \$.50 per acre at 6% or about \$.43 per acre at 7%, the prevailing interest rates. Just two years later, the State resold the same land to settlers for an average of \$3.53 per acre. See Hammond's "History of Madison County", p. 699. See Laws of New York, 20th Sess. Chap. 80, April 1, 1797. In 1795 Mr. John Lincklaen, as agent for the Holland Land Company, was selling land just south of the Reservation for \$1.50 to \$3.00 per acre. Hammond, p. 210.

As will be shown below, the 1795 purchase was illegal under federal law. See Section 4 of the Indian Non-Inter-course Act of July 22, 1790 (1 Stat. 138); Section 8 id of of March 1, 1793 (1 State. 330) and Section 177 of the present Federal Indian Law 25 U.S.C.A. The New York Legislature must have been concerned with the federal statute because in 1798 the State requested the appointment of and dealt with a federal commissioner on the further purchase that took place that year. See Laws of New York, 22nd Sess. Chap. 87, April 2, 1799.

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Over the next 40 years, the Oneidas "sold" the balance of their 300,000 acre Reservation to the State in a series of so-called treaties, all of which were in violation of federal law forbidding such sales without the consent of the United States. Section 177 of 25 U.S.C.A. The last such "sale" was in 1842. With rare exceptions the Indians signed these treaties with an "X", their mark. (The Oneidas presently have a claim pending against the United States and the Indian Claims Commission for allowing this to happen. The United States denies any liability.) A summary of the more important sales follows:

<u>Date of Sale</u>	<u>Annuity Promised</u>	<u>Approximate Per Acre Price</u>
1785	\$ 0	\$0.04
1788	\$ 600	\$0.004
1795	\$3269	\$0.50
1798	\$ 700	-
1802	\$ 300	\$0.85
1802	\$ 300	\$0.85
1807	\$ 645	\$0.75
1809	\$ 120	\$0.56
1810	?	\$0.50
1811	\$ 332	\$0.50
1811	\$ 72	\$0.50
1815	\$ -	\$1.00
1817	\$ 121	\$2.00
1824	\$ 300	\$2.60
1826	\$ -	\$3.00
1827	\$ -	\$3.50

11. The entire principal value of all annuities promised to the Oneidas is about \$115,000. See "History of Oneida County", Everts & Fariss (1878) p. 66. Allowing for down payment, their original 4,000,000 to 6,000,000 acres were sold for less than \$150,000 total. About \$123,000 of this was for the 300,000 acres set aside as the Oneidas' Reservation in 1788 and confirmed to them by the treaty between the Iroquois and the United States at Canandaigua in 1794; Article 2, 7 Stat. 44; and by Section 177 of 25 USCA.

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For their Reservation of about 300,000 acres, the Indians received a total principal price of less than \$150,000, an average of no more than \$.50 per acre. [53]

Of their original Reservation, the Oneidas, despite Section 177 of the Federal Indian Law, have only two small parcels left so far as record title is concerned. These are located on New York Route #46 just within the boundary of the City of Oneida, New York and near Route #5 in Sherrill, New York.

LAND VALUES

12. The Oneidas did not receive anywhere near a fair consideration, even allowing for the difference between wholesale and retail sales. Our research indicates that when the Oneidas were receiving annuities based on forty to fifty cents per acre, white men were buying and selling nearby land for cash at \$3.00 to \$10.00 per acre and up. When the Oneidas were receiving \$1.00 to \$3.00 per acre, white men were buying and selling for \$10.00 per acre and up. Land values can be established from recitals in deeds contemporaneously filed in the Oneida, Chenango and Madison Counties Clerks' Offices and from the still extant records of Peter Smith and John Lincklaen, men who subdivided and made fortunes selling off the former Oneida lands.

To understand this, we must remember that Madison County was fully civilized and a "boom" area in the 1790's and early 1800's. Numerous turnpikes and the Erie Canal were being built right through the center of the Reservation. As the current official map and summary history of Madison County indicate, "A great influx of settlers to Madison County was promoted by these first highways", and "The County was rapidly settled, growth being stimulated by three main roads which crossed from East to West". By 1810 the County had a population of 25,000; by 1830 it was

Affidavit of Jacob Thompson and George C. Shattuck,
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39,000; by 1840 it was 40,000 and probably had more working farms and farmers than it has today.

13. To give some idea of the range of values circa 1785-1800, we submit the following extracts of price information found in official state records:

[54]

(a) Massachusetts in 1787 sold to Samuel Brown 230,000 acres, west of the Oneidas' 1788 sale, for \$0.125 per acre. Richards "Historical Atlas of New York State", p. 65. This was over thrity time per acre more than the Oneidas received for their 1788 sale.

(b) In 1788 Massachusetts sold to Nathaniel Gorham and Oliver Phelps the pre-emption right to purchase 6,000,000 acres of Western New York from the Indians. The consideration was \$.03 per acre. See Richards, p. 65, and Whipple Report, p. 17. Under the Hartford Compact of 1786 the pre-emption right belonged to Massachusetts and the land itself to New York. The \$.03 per acre was not for the land, but for the right to try to buy it from the Indians -- presumably at a fair price in addition.

(c) In 1791 Gorham and Phelps turned back 4,000,000 acres to Massachusetts, which then re-sold the pre-emption right to Robert Morris for \$333,000, Richards p. 65. (Per the Whipple Report, p. 18, the price was \$225,000.) This comes to \$.08 per acre just for the pre-emption right.

(d) Over the next few years most of the lands purchased from the Oneidas in 1785 and 1788 were sold off. Richards p. 65, describes some of the prices:

- townships sold at auction from \$.16 to \$.80 per acre;
- Chenango townships, purchased from the Oneidas in 1788 for \$.004, sold

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for 3 shillings three pence (\$.40?)
per acre in 1794;

- Macomb's purchase in North Country
at \$.16 per acre for 4,000,000 acres
in 1791 included former Oneida lands;
- Scriba's patent in 1791 at \$.16 per
acre for land north of Oneida Lake;
- Holland Land Company purchased 50,000
acres at about \$.62 per acre just south
of Reservation in 1792; and
- same company purchased 64,000 additional
acres for \$.75 per acre in 1792. [55]

Remember, these lands were purchased from the Oneidas
in 1788 for about \$.004 per acre.

If the variations in these wholesale prices make little
sense, we must remember that it was New York's policy
to get the land settled as quickly as possible. The price
it got for the land was not the important thing. In many
cases it was sold at auction to the highest bidder.

14. As between white men, dealing in smaller lots at
arm's length, we have a quite different picture. Following
is a compilation of some early land sales in Chenango
County (now Madison County). This covers roughly the
1795 period when the Oneidas received \$.50 per acre and
includes land immediately south of the Oneida Reservation:

From Early Real Estate Records
Chenango County, New York

Date	Page	Acres	Price	Price/Acre
1810	1	179	\$ 126.	.71
1800	1	40	\$ 200.	5.00
1798	1	11	\$ 34.	3.00
1798	1	47	\$ 225.	4.90
1799	1	51	\$ 375.	7.40
1798	2	57	\$ 400.	7.00
1800	2	10	\$ 100.	10.00

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<u>Date</u>	<u>Page</u>	<u>Acres</u>	<u>Price</u>	<u>Price/Acre</u>
1795	2	50	\$ 50.	\$1.00
1799	2	64	\$ 500.	7.80
1799	2	250	\$ 950.	3.80
1799	2	50	\$ 700.	14.00
1800	2	70	\$ 900.	1.30
1796	2	50	\$ 150.	3.00
1800	2	58	\$ 35.	.60
1799	2	20	\$ 100.	5.00
1801	3	57	\$ 25.	.44
1800	3	40	\$ 140.	3.50
1794	3	250	\$ 125.	2.00
1799	3	20	\$ 100.	5.00
1800	4	4	\$ 60.	15.00
1799	6	20	\$ 160.	8.00
1797	6	50	\$ 269.	5.40
1799	7	20	\$ 160.	8.00
1796	7	323	\$ 323.	\$1.00
1797	7	255	\$ 267.	\$1.00
1798	7	290		10 shillings
1797	8	100	\$ 700.	7.00
1799	8	313	\$1500.	4.80
1794	8	250	\$ 125.	.50
1799	9	50	\$ 227.	4.50
1798	9	101	\$ 267.	2.60
1800	9	313	\$1400.	4.50
1798	10	79	\$ 300.	3.80
1799	11	150	\$ 10.	.60

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1799	11	51	\$ 375.	7.40
1800	11	150	\$ 75.	.50
1800	12	150	\$ 75.	.50
1799	12	500	\$ 550.	1.10
1798	12	160	\$ 25.	.50
1801	12	179	\$ 126.	.70
?	13	60	\$ 240.	4.00
?	13	150	\$ 318.	2.10
1800	14	58	\$ 35.	.60
1798*	14	250	\$ 858	3.40
1801	14	49	\$ 71.	1.40
1798	14	57	\$ 400.	7.00
1801	15	120	\$ 340.	2.80
1801	15	24	\$ 209.	8.80
1799	15	158	\$ 160.	1.00
1796	15	50	\$ 200.	4.00
1797	16	250	\$ 500.	2.00
1800	19	40	\$ 140.	3.50
1793	21	150	\$ 116.	\$3.00
1798	21	11	\$ 34.	3.00
1793	21	150	\$ 86.	\$ 1/2
1798	21	150	\$ 303.	2.00
1797	21	250	\$ 500.	2.00
1798	21	250	\$1250.	5.00
1797	21	250	\$ 500.	2.00
1797	21	79	\$ 300.	3.80
1798	21	117	\$ 500.	4.30
1800	22	10	\$ 100.	10.00
1798	22	250	\$1250.	5.00
1798	22	250	\$1513.	6.10
1797**	22	1-1/2	\$ 830.	
1801	23	100	\$ 500.	5.50

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<u>Date</u>	<u>Page</u>	<u>Acres</u>	<u>Price</u>	<u>Price/Acre</u>
1800	23	20	\$ 104.	5.00
1800	23	150	\$ 200.	1.30
1800	24	20	\$ 101.	5.00
1796	24	50	\$ 200.	4.00
	24	60	\$ 240.	4.00
1800	24	4	\$ 60.	15.00
1801	24	100	\$ 550.	5.50
1799	25	110	\$ 244.	3.00
1797	25	281	\$ 844.	3.00
1799*	26	158	\$ 127.	5.60
			+ 760. Mtg. Due	
			\$ 887.	
1800	27	40	\$ 900.	22.00
1801	27	117	\$1220.	10.50
1799*	27	158	\$ 160.	5.80
			+ 760. Mtg. Due	
			\$ 920.	
1798*	28	250	\$ 858.	3.40
1799	28	50	\$ 237.	4.80
1799*	28	110	\$ 244.	2.20
1801	29	125	\$ 390.	3.10
1799	29	160	\$ 250.	1.50
1801	30	42	\$ 213.	5.00
1797	30	250	\$ 250.	1.00
1799	30	500	\$ 550.	1.10
	30	313	\$1400.	4.50
1797	31	250	\$ 250.	1.00
1798	31	117	\$ 500.	4.30
1800	32	150	\$ 133.	.89
1801	33	50	\$ 250.	5.00
1796	34	50	\$ 150.	3.00

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1796	35	323	\$1221.	\$3.50
1797	35	4065		5 shillings
1798	35	291		10 shillings
1797	35	281	\$ 844.	3.00
1800	35			5 shillings
1801	36	24	\$ 207.	8.80
1796	36	125	\$ 75.	6.50
1800	36	70	\$ 900.	12.20

* Former Oneida Reservation

** Town Lot

Note: Because the lists contained both grantors and grantees, there may be considerable duplication in the above transactions. However, they do give a rough idea of what land to the south of the Reservation as of 1795-1800 was selling for.

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15. What standards should be applied to measure the difference between what the Oneidas received and should have received are for expert witnesses at a trial of fact. The point is that the Oneidas were defrauded of their land under official state policy. Although the 1785 and 1788 purchases preceded Section 177 of 25 USCA, this review shows what the policy was. A text on "The Holland Land Company" p. 192, sums this up:

" . . . Here the usual accounts of the Big Tree Treaty end but unhappily this, like most other treaties with the Indians, has an unsavory side which originally was concealed as far as possible and has rarely been spoken of since. From the time when Indians were recognized as independent nations who possessed rights in the lands they occupied, the Indian status was anomalous. Their ownership was something different from the ownership of Spaniards and Canadians over the border. The morality of the day, not so different after all from that of our own, countenanced universally measures for the purchase of such ownership at prices far below its true value. No one thought of paying the Indian the full worth of his lands. No commissioner, appointed by the President to see justice done at the treaties, felt for a moment that it was his duty to warn the Indians that they were being unfairly treated. He did not indeed believe that they were. Nor did Government at the time . . . "

LAND TITLES

16. This is not the first time the New York Indians have asked for justice. In 1888-89 a special committee of the Legislature, headed by Assemblyman Whipple of Salamanca, made a complete investigation of the "Indian Problem". See Assembly

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Document #51, February 1, 1889, commonly known as the "Whipple Report". This document sets forth the history of the Oneidas' land cessions in detail, including all their treaties with the United States and New York.

17. In 1919 the Legislature again created a special committee to investigate the New York Indians' status. The Chairman of the Committee, Assemblyman Edward A. Everett, published a report that the Iroquois Indians were still the fee owners of most of New York State. The other members of the Committee refused to sign this report, one saying it was not their job to "dig up irrelevant matters from the past".

18. For current legal authority on the title issue, we can look to the four-square holding of the Second Circuit Court of Appeals in the Tuscarora case, 257 F. 2d 885 (1958). The main issue there was whether Section 177 applied to condemnation of Indian Reservations by the State of New York. The State and its agencies claimed that it could acquire title from Indians without the presence of a U. S. Commissioner and without consent of the United States. The brief of Louis J. Lefkowitz, Attorney General in that case, states at page 34:

"The Indian Intercourse Act of 1802 (2 Stat. 103) provides that title to Indian lands must be extinguished by a treaty made in the presence of a United States Commissioner. The provisions of that act, however, are not applicable to the thirteen original states which, it will be remembered, derived their title to Indian lands directly from the British Crown and not from the Federal Government. (Citations)

"Actually, a very large number of agreements were made with the New York Indians extinguishing their

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titles without the presence of a United States
Commissioner . . ." (Emphasis Added)

The brief of Thomas F. Moore, Jr., Attorney for the
New York Power Authority, makes this same point at pages
12-23. It states in part:

[59]

"Except for the period from 1790 to 1793, New York
made a practice of purchasing Indian rights of
aboriginal occupancy without the intervention of
the Federal Government." p. 12 * * *

"While as our memorandum below shows, at pages
27, 49-52, New York purchased some Indian land
rights at Federal treaties subsequent to 1793, in
most instances when it purchased such rights it did
so without Federal intervention. A vast part of the
territory within the State was purchased by the
State without such intervention. The present day
title to this area depends upon the validity of
these purchases. Invariably when such purchases
were challenged the courts have sustained them."
(Emphasis added)

The cases cited by Mr. Moore for the above are inter-
esting. Seneca Nation v. Christie, 126 N.Y. 122, 162
U.D. 283, was decided upon the narrow issue of the stat-
ute of limitations. Deere v. State Power Authority, 32 F.
2d 550 (1927), was decided on the issue that an action of
ejectment does not present a federal question just because
the plaintiffs were Indians. U. S. v. Franklin Co., 50 F.
Supp. 152 (1943), and St. Regis v. State, 5 N.Y. 2d 24
(1958), do squarely hold that Section 177 does not apply to
New York State. The St. Regis case was decided by the
New York Court of Appeals in June 1958 and the Tuscarora
case by the Second Circuit in July 1958. This presents a
square conflict between state and federal courts, which
even now the New York Courts are tending to resolve in

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favor of federal constitutional pre-eminence. See Pierce v. The State Tax Commission of the State of New York discussed below.

19. An article, "Drums Along The Power Ways", Albany Law Review 1958, says:

"The decisions of the federal court - (Tuscarora case) - impugns the validity of past and contemporary takings of Indian lands and throws many Indian alienated titles in the State of New York into chaos and confusion."

The memorandum referred to in the Power Authority's brief (quoted above) states that: [60]

"Since 1793, the Federal statute - (Section 177) - has not been considered a prohibition applicable to purchases of Indian lands in New York State. At least thirty-nine agreements or 'treaties' have been entered into since then by which Indian land rights were acquired without the presence or supervision of a United States Commissioner. Titles to hundreds of thousands of acres in New York State stem from such agreements or 'treaties'." p. 27.

* * *

"No participation by the United States was invited or given during the years 1793-1845 when the State of New York made 24 other treaties with various bands of Oneidas, 6 with the St. Regis, 5 with the Onondagas, 3 with the Cayugas, and at least one with the Senecas. Titles to very large and important parts of the State are held under these treaties and they always have been and still are regarded as valid." p. 52.

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20. A fairly complete history of these "treaties" and the federal-state relation is set out in the affidavit of Henry S. Manley which appears in the record of the Tuscarora case. This affidavit, which was submitted in behalf of the Power Authority, states in a footnote on page 7 thereof:

"Titles to large areas of the State would be invalidated, as well as important rights upon the existing reservations (such as railroad line and utility lines and highways across the reservation now involved) if the plaintiffs' contentions were upheld."

21. Presumably to Mr. Manley's surprise, the "plaintiffs' contentions", the Indians' contentions, were upheld by the Second Circuit on this point. The final holding of the United States Supreme Court clearly reinforces the Second Circuit's decision on the applicability of Section 177 to New York State. See Footnote #18 of Opinion at 80 S. Ct. 556, which states that the U.S.:

". . . promised to hold the Oneidas and Tuscaroras secure in the lands on which they lived—which were the lands in Central New York about 200 miles east of the - (Tuscarora) - lands in question."

It distinguished the Tuscarora lands near Niagara Falls on the ground that title there derived from the Holland Land Company by purchase and that the particular land was not the the same as referred to in the treaties with the United States. The lands involved in

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this case are the very same lands which they owned when the U.S. treaties were made and which they had owned, occupied and protected as their ancestral hunting grounds long before Columbus was born. They are the very same lands referred to in the Supreme Court's footnote cited above.

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22. The implications of the Tuscarora decision are staggering. The State in its legal papers admitted that title to large areas of the State were at stake--and then lost. An article in the Buffalo Law Review, Fall 1958, assesses the effect of the Tuscarora decision of the Second Circuit:

"The Tuscarora decision of the Court of Appeals came, after all, in a case which the state deliberately chose to make the most elaborate presentation of its position and to argue on the broadest possible grounds. All the greater the significance then--and all the more penetrating the likely impact-- of the repudiation of New York's contentions."
p. 21.

LEGAL STATUS OF ONEIDAS

23. The Oneidas are a nation within a nation. It seems strange in this day that there exist in New York State several independent nations, among them the Oneida Indian Nation. Yet this is so. Several U.S. treaties recognize and deal with the "Oneida Nation" and these are in effect today with the full force of law. See Treaties of 1784, 1789, and 1794. They are the law of the land. At least twenty-four "treaties" with New York also recognize and deal with the Oneida Indian Nation, the first in 1785 and the last in 1846.

24. A generation ago, the federal courts reaffirmed the status of the Oneidas in U. S. v. Boylan, 256 F. 468 (2d Cir. 265 F. 165).

25. Last Spring, right on schedule, the Oneidas received their quota of unbleached muslin cloth as promised under the federal treaty of 1794. In appropriating money for this purpose, Congress has continually reaffirmed the treaty obligations of the United States. [62]

26. A very recent decision of the Appellate Division,

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**Fourth Department, New York Supreme Court, affirms the
vitality of the Six Nations Treaty:**

**" . . . The power of Congress to deal with them -
(the New York Indians) - regardless of New York's
actions or desires is unquestioned. "**

*** * ***

**"Legislative power over Indian affairs is vested
in Congress. 'The Congress shall have power ...
to regulate Commerce with foreign Nations ... and
with the Indian Tribes.' (U.S. Const. Art. I, §8,
cl. 3. See, e.g., Hallowell v. United States, 221
U.S. 317; Worcester v. Georgia, 31 U.S. (6 Pet.)
515; United States v. Kagama, 118 U.S. 375; United
States v. Thomas, 151 U.S. 577.) There is no
doubt the legislation implementing this Constitutional
mandate ousts state law on the same subject and to
the extent that a state enactment otherwise valid
interferes with or impedes the operation of a
federally-created scheme to fulfill the obligation
toward the Indians, the state law must fall.
(McCulloch v. Maryland, supra; Board of County
Commr's. v. United States, 308 U.S. 343.) Thus
if any interference with the federal program for the
Indians can be shown to result from the taxes
sought to be imposed, the taxes must be struck down
and the judgment below affirmed. "**

**The above quoted language is from Pierce vs. The State
Tax Commission of the State of New York, decided January
11, 1968, by the Appellate Division, Fourth Department.
This case holds that the State cannot tax sales of articles
made and sold on an Indian Reservation.**

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THE PURCHASE OF 1795

27. This memorandum has sought to picture a broad sweep of history from the time of the American Revolution, when the Oneidas helped feed Washington's army at Valley Forge and stood in battle at the side of Colonial troops at the battles of Oriskany and Fort Plain, to the mid-1840's when the last pitiful remnants of the Oneida Reservation were bartered away to their former allies.

28. To put things in a sharper focus, this section deals with a limited phase of the history of the Oneidas. It deals with the very tract at issue in this case. See Exhibit II where outlined in red. This is unlike the usual "Indian case" where

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experts and historians theorize on what land hundreds of miles west of the Frontier was worth. In much of the period described herein, the Oneidas' Reservation was hundreds of miles east of the Frontier, in settled, civilized and organized country. Land values here are not a matter of speculation. They are established by recorded deeds of nearby parcels, state laws and other contemporary records, including the books of account of the very men who sub-divided and sold off the Oneidas' Reservation. (Deponents have studied the books of John Lincklaen, agent for the Holland Land Company, at his home in Cazenovia, New York. The books and journals of Peter Smith, who bought and sold land over the entire area, are in the Library of Syracuse University and Cornell University.)

Let's take a look at the "treaty" of 1795 between the Oneidas and New York State in which they sold to the State a huge slice of the Reservation confirmed and guaranteed to the Oneidas by federal treaties and federal law. The consideration for the 1795 sale was expressed in terms of a perpetual annuity in dollars for measured land plus an annuity of three dollars per year for every hundred acres

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on certain unmeasured land. This amounts to a principal price of \$.50 per acre for very valuable and desirable land. No United States Commissioner was present and the United States has never ratified this sale. Every Indian who signed the treaty used an "X".

29. In the period 1792-1795 the Holland Land Company, through its agent, John Licklaen of Cazenovia, was selling tracts of nearby land (not part of the Reservation) at from \$1.50 to \$4.00 per acre unimproved. From 1795 to the early 1800's nearby land was sold to settlers at \$4.00, \$5.00, and \$6.00 per acre. According to Lincklaen's records, land involved in the 1795 purchase, the New Peterborough Tract, was sold off at from \$6.00 to \$10.00 per acre from 1800 to 1805.

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Despite some tapering off of the land boom after 1795, the land purchased by the State for \$.50 per acre in 1795 was sold off in 1797, just two years later, to white settlers and developers, including the aforementioned Peter Smith, for \$3.535 per acre. This represents a profit to the State of \$3.035 per acre in just two years. Also, the Oneidas did not receive cash; they received only a perpetual annuity of \$0.03 per acre (6%).

30. As of 1795, the Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330), substantially the same as the present Section 177, was in effect. New York cannot argue now that this statute was not applicable to New York because the State Legislature in 1796 and 1798 recognized the power of the U.S. Commissioner for Indian Affairs in New York. See Laws of New York, Nineteenth Session, Chap. 39 (1796) and Twenty-Second Session, Chap. 87 (1798). The minutes of the New York Land Office, p. 99, Vol. 3, recite that the U.S. Commissioner, Joseph Hopkinson, was present at the Oneidas' 1798 cession to the State. One wonders why the State breached the law in 1795 and observed

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it in 1798, and after the 1798 purchase again disregarded federal law which its own Legislature had recognized as applicable in 1798.

The 1795 purchase was only one of a series of similar transactions in which the Oneidas lost their entire 300,000 acre Reservation.

THIS CASE IS PROPERLY BEFORE A FEDERAL COURT

31. Section 194 of 25 USCA shows that the Federal Courts are endowed with jurisdiction over cases on Indian land questions. If Section 177 of USCA applied to New York State, and recent court decisions uniformly hold that it does, then Section 194 also applies:

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." §194, 25 USCA.

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"This section is evidence of the policy of the government to give Indians the benefit of the doubt on questions of fact or construction of treaties or statutes relating to their welfare." Anno. to Section 194 in official report referring to 34 Op. Atty. Gen. 439 (1925).

32. It may be asserted by the State that too much time has passed for the Oneidas now to press their claim. The other side of this coin is that 173 years is a long time to wait for justice. No statute of limitations or equitable laches bars the claim. U.S. v. State of Minnesota, supra; U.S. v. 7405.3 Acres of Land, 97 F. 2d 417 (CCA 4, 1938); U.S. v. Forness, 125 F. 2d 928 (CCA 2, 1942).

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Even if the suit were by the Indians and not the United States, no state statute of limitations would be allowed to frustrate federal law and federal constitutional policy. Schrimscher v. Stockton, 183 U.S. 290, 22 S. Ct. 107 (1902). In fact, until very recently an Indian nation or tribe had no capacity to sue as such in the State Courts of New York. See "New York Jurisprudence" §17; Pharaoh v. Benson, 164 A.D. 51 (1914), affd. 222 N.Y. 665; St. Regis Tribe v. State of New York, 4 Misc. 2d 110 (1956), reversed on other grounds 5 A.D. 2d 117.

For these 170 years the New York Indians have been precluded from recovering their lands by a maze of legal technicalities; Pharaoh v. Benson, supra; Seneca Indians v. Christie, 126 N.Y. 122 (1891); and Deere v. St. Lawrence Pow. Co., et al., 32 F. 2d 550 (CCA 2, 1929). Only the Courts of the United States can free the Oneidas from the legal bondage imposed on them by the Courts of New York.

33. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article IX of the Articles of Confederation and under Article 1, §8, of the United States Constitution. Under this power, treaties were made with the Oneidas, which read in part as follows:

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Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled.

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

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Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

Treaty with Oneida, Tuscarora and Stockbridge Indians
- Oneida 1794

"Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ."

(Here followed promises to erect a sawmill and other improvements on the Reservation and to

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compensate the Oneidas for damages suffered in the War.)

34. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 USCA. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

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"Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Hear well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

"The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

The plaintiffs herein claim the jurisdiction and protection of the Federal Court. The case most clearly turns on interpretation and implementation of the treaties and laws of the United States.

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The case most clearly involves Constitutional rights to due process and equal protection, which have long been denied to American Indians.

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SUMMARY

35. The Oneida Nation was in the way of America's expansion to the West. Unfortunately their Reservation was square across the gateway. The Oneidas were dispossessed by official act and policy of New York State. In truth, their property was condemned for public purpose, but without fair and adequate consideration. This is demonstrable from the very records of New York State. The property was also taken in contravention of specific federal law which is even now in effect.

The Oneidas have been denied property without due process of law, and the State has never granted them a forum where they could seek redress. What they want now is their day in court.

The United States in formal treaty has promised to help their former allies in time of need. "Great nations, like great men, should keep their word". The Oneidas believe that the United States, acting through its courts, should keep its word to them given by George Washington and in three formal treaties.

Respectfully,

s/ JACOB THOMPSON

Jacob Thompson, President,
ONEIDA INDIAN NATION OF
NEW YORK

s/ GEORGE C. SHATTUCK

George C. Shattuck, Attorney

(Sworn to November 12, 1970).

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Exhibit "T" — Map
annexed to Thompson and Shattuck Affidavit.

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MAP IS TOO LARGE

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**Exhibit "I" — Map
annexed to Thompson and Shattuck Affidavit.**

E TO BE FILMED.

AFFIDAVIT OF DELIA WATERMAN, Filed 11-18-70.

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(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

I, DELIA WATERMAN, being duly sworn, depose and say that:

1. I reside on the Oneida Indian Reservation in the City of Oneida, New York, located adjacent to the present route 46.

2. I am the hereditary clan mother of the Wolf Clan of the Oneida Indians of New York State, and I am 70 years of age.

3. Based on tradition and to a lesser extent on written material, handed down from generation to generation, I can state that the Oneida Indians have always asked to obtain justice from New York State in respect to the Reservation that was illegally acquired by the State.

4. Because of our poverty and because of legal technicalities which have barred us from State Courts, the Oneida Indians have never been able to assert our claims. The State has taken our land for an inadequate price and in violation of federal law; and to protect itself the State has ruled that an Indian Tribe cannot sue in its Courts. [71]

5. There has been no lack of diligence, legally termed "laches", on our part in asserting our rights. Rather, our small voice has been unheard for 150 years.

6. Since the State's laws and courts are inadequate to protect the rights of the Oneida Indians, we have no recourse but to appeal to federal courts and federal laws.

7. The currency and vitality of the federal laws and treaties in relation to the Oneida Indians is demonstrated

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by the fact that each year we receive an allotment of "treaty cloth" pursuant to the Treaty of Canandaigua, also called the Six Nations Treaty, concluded in 1794. Attached as an exhibit to this affidavit is a piece of the "treaty cloth" recently received from the United States of America.

s/ DELIA WATERMAN

(Sworn to November 15, 1970).

**CROSS - MOTION TO AMEND COMPLAINT, ETC.,
Filed 11-18-70.**

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(SAME TITLE).

PLEASE TAKE NOTICE that on the 23rd day of November, 1970 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the plaintiffs in this action will move this Court at a Motion Term in the Federal Building in the City of Utica, New York, for an order permitting plaintiffs to amend their complaint herein to substitute a new paragraph 2 to read as follows:

"2. The matter in controversy exceeds, exclusive of interests and costs, the sum of \$10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA because plaintiffs have been and are being deprived of property without due process of law and without

**Cross-Motion to Amend Complaint, etc. ,
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**equal protection of the law, in violation of their
rights under the Constitution of the United States. "**

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This motion and plaintiffs' opposition to defendants' motion to dismiss is based on the following points, on the affidavit of George C. Shattuck, attached hereto, and on the affidavit of Delia Waterman and the joint affidavit of Jacob Thompson and George C. Shattuck filed herewith.

1. The complaint states allegations bringing the case into the jurisdiction of this Court under the federal question rule involving the Constitution, Treaties, and Laws of the United States. It also alleges that property was taken and continues to be withheld from plaintiffs without due process of law.

2. The defenses of laches, statute of limitations, and "purchases for value" are affirmative defenses which should be pleaded in defendants' answers. They are not relevant to whether the complaint states a cause of action.

3. Further, no concept of laches, statute of limitations, or "purchases for value" applies in this case, which is to be determined under the Federal Constitution, formal Treaties of the United States, and specific federal laws governing the rights of Indians.

4. The State's immunity from certain actions in federal courts does not apply to counties.

5. State laws requiring certain notice periods and places of trial do not apply in a federal court action involving the Constitution, Treaties, and Laws of the United States.

6. The fact that the defendant counties were not in existence in 1795 is not relevant, since they derived their title from the illegal and void State purchase of 1795.

**Cross-Motion to Amend Complaint, etc.,
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7. The case before the Indian Claims Commission does not affect the rights of the parties herein. The Indian Claims Commission can grant damages for the wrongful acts of the United States, but it has no power to alter land rights guaranteed by Treaties and Laws of the United States.

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8. A suit against the State of New York is not available as a remedy for plaintiffs because such a suit cannot be maintained in either a State or a Federal Court; further, the consent of the United States would be required in any settlement or judgment respecting land titles. Section 177 of 25 USCA.

9. Defendant, Oneida County, contends that the Oneidas' title is not to a fee but only to a right of occupancy. Historically New York has claimed a "pre-emption right" to acquire Indian lands. Whatever the status of other Indian Tribes in this State, the Federal Treaties clearly guaranteed the Oneidas what amounts to an inalienable fee interest.

10. The plaintiffs herein have exhausted all remedies and made all administrative appeals before initiating this suit.

11. The complaint clearly states a cause of action for monetary relief requiring both factual determinations and interpretation of the United States Constitution, Treaties of the United States, Laws of the United States, and decisions of Federal Courts.

12. The defendants' motions should be dismissed; the plaintiffs' motion for leave to amend their complaint should

**Cross-Motion to Amend Complaint, etc.,
Filed 11-18-70.**

**be granted; and the defendants should be required to plead
affirmative defenses in their answers.**

**s/ GEORGE C. SHATTUCK
Attorney for Plaintiffs
BOND, SCHOENECK & KING
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121**

[75]

TO:

**RICHARD A. FRYE, ESQ.
Attorney for Defendant County of Oneida
Office and Post Office Address
Oneida County Office Building
800 Park Avenue
Utica, New York 13501
Telephone (315) 798-5910**

**WILLIAM L. BURKE, ESQ.
Attorney for Defendant County of Madison
Office and Post Office Address
29 Lebanon Street
Hamilton, New York 13346
Telephone (315) 824-3550**

**AFFIDAVIT IN SUPPORT OF CROSS-MOTION
AND IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS.**

[76]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

GEORGE C. SHATTUCK, being duly sworn, deposes and says that he is the attorney for plaintiffs in this action and that this affidavit is submitted in support of plaintiffs' motion for an amended complaint and in opposition to defendants' motion for judgment.

CONCERNING JURISDICTION

1. A. An amended complaint should be allowed herein because the facts alleged and the Federal Treaties and Laws invoked in the complaint present a federal question within the meaning of Section 1331 of 28 USCA. In this case are involved serious questions of public significance which require interpretation of the Constitution, Treaties, and Laws of the United States. The controversy here is real and substantive and vitally affects the interests of the parties.

Section 233 of 25 USCA indicates a specific intent that the Courts of New York State shall not have jurisdiction in civil cases involving Indian lands. This statute, effective September 13, 1952, conferred upon the Courts of New York State civil jurisdiction over cases where Indians were parties.

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Before 1952 Indians could not sue or be sued in New York Courts. After conferring such jurisdiction, the statute states certain provisos which specifically retain to Federal Courts jurisdiction over Indian land, e.g.,

"Provided further; That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable

**Affidavit in Support of Cross-Motion and in Opposition
to Defendants' Motion to Dismiss.**

the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

B. An amended complaint should be allowed herein because the facts alleged and Federal Treaties and Laws invoked in the complaint show that property has been taken, and continues to be withheld, from plaintiffs without due process of law. Because of their status as a minority race the plaintiffs have been denied equal protection of the laws of New York and of federal laws. The violation of plaintiffs' Constitutional rights has been a flagrant and long continued deprivation of their right to property which they own under the law of the United States. Sections 1983 and 1984 of 42 USCA confer jurisdiction in such case.

C. There is jurisdiction under the diversity of citizenship rules because the Oneida Tribe of Indians of Wisconsin, Inc. have a separate, distinct and severable interest from that of the Oneida Indians of New York. Over 100 years ago they became distinct and separate legal entities, located in different states, and supervised under different concepts of the federal laws in respect of Indians.

The Oneida Indians of New York should be named as proper parties herein because they have no remedy in the Courts of New York State. This point is clearly substantiated in the many jurisdictional and laches-type objections raised in the affidavits of defendants' counsel, Mr. Frye and Mr. Burke. This

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is not a case of improper joinder to obtain federal jurisdiction; as shown by defendants' own affidavits, the plaintiffs have no other choice, no other forum to have their rights adjudicated.

**Affidavit in Support of Cross-Motion and in Opposition
to Defendants' Motion to Dismiss.**

**CONCERNING THE POINTS
RAISED BY DEFENDANTS**

2. A. Defendants have asserted certain affirmative defenses which raise questions of fact; such as alleged laches, periods of limitations, "purchases for value". Such affirmative defenses should be pleaded in defendants' answers and have no bearing on whether the allegations in the complaint state a cause of action.

B. The affidavits of Delia Waterman and of Jacob Thompson and George C. Shattuck, filed herewith, show why such defenses will be of no avail. A person who is under a disability to bring a suit cannot be said to have waived his rights. The Courts of New York State have consistently denied to Indian Nations or Tribes the right to initiate a lawsuit in their behalf. You cannot "sleep on a right" you don't possess. Until recently, Indians have been barred by federal law from all civil suits in state courts, c.f. Sec. 233 of 25 USCA.

C. Plaintiffs do not claim, in the case at bar, moneys or property due years ago. They claim the fair rental value for the period January 1, 1968 through December 31, 1969; a period of about two years prior to service of the complaint. Other cases may be brought for past or future damages but they are not before this Court.

D. This case is brought under federal law. As defendant's attorney, Richard A. Frye, points out in his affidavit ". . . there is no general federal statute of limitations . . .". Paragraph 11.

3. The defenses of the laches, periods of limitation, "purchases for value" type depend on state law concepts; again as Attorney Frye points out in his affidavit. These concepts just

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do not apply to Indian Reservations because of Section 177

**Affidavit in Support of Cross-Motion and in Opposition
to Defendants' Motion to Dismiss.**

of 25 USCA, which dates back to 1790. If state law cannot reach out to condemn Indian land for state purposes, Tuscarora Nation of Indians v. Power Authority, 257 F 2d 885 (2d Cir. 1958), it certainly cannot act as a shield to protect one who wrongfully takes such land.

4. A. Defendants apparently claim immunity from suit under the 11th Amendment to the U.S. Constitution, which bars suits against states by citizens. The states' immunity, however, does not apply to counties or other political subdivisions. *The text, "The Constitution of the United States of America", 1964 Edition, prepared by the Library of Congress states:

"Subsequent cases giving the - (11th) - amendment a restrictive effect are those holding that counties and municipalities are suable in the federal courts; and that government corporations of the state are not immune when suable under law which created them." p. 1046.

B. Defendants' affidavits state that there is no enabling act which permits this suit. There is no state enabling act and none is needed. This is a Federal Court and the enabling acts are:

- (i) Section 1332 of 28 USCA
- (ii) Section 1331 of 28 USCA
- (iii) Sections 1983 and 1984 of 42 USCA.

5. A. the 90 day notice period and the one year period of limitations do not apply in federal courts. State laws cannot frustrate the federal Constitution, Treaties, and Laws. Tuscarora Nation of Ind. v. Power Authority, id.

B. Moreover, notice was given to defendants in this action. On January 29, 1970 a copy of the complaint herein was mailed to the County Attorney of each defendant with a letter stating that plaintiffs proposed to file the

**Affidavit in Support of Cross-Motion and in Opposition
to Defendants' Motion to Dismiss.**

complaint. This completely adequate notice was given just ten days before this action, based on a continued trespass, was commenced. [80]

6. The fact that defendant counties were not in existence in 1795 is immaterial here. The complaint, as amended, alleges damages from January 1, 1968 through December 31, 1969. Both defendants were in existence during such period.

7. The case before the Indian Claim Commission does not bar this claim. The Indian Claims Commission was created by Congress in 1946 to hear claims against the United States. Sec. 70a of 25 USCA. No decision of the Indian Claims Commission can change title to Indian Reservation land. Nor can it retroactively legalize a wrongful taking of land by granting damages in respect of the United States' part in the wrongful act.

8. The defendants' affidavits suggest that the proper remedy lies in a suit directly against New York State. As shown by plaintiffs' affidavits herein, such a suit is not possible without consent of the State.

9. A. The distinction between fee title, "right of occupancy", "aboriginal possession", and other concepts of property rights has no place in this suit. It is not relevant.

B. The nations which conquered and settled North America and the original Colonies never conceded that Indians had fee title. They had to take this position in order to justify their original settlement and conquest; and to some extent this position was taken in order to protect the Indians who had no conception of what the Europeans meant by written deeds and conveyances. The point, however, is that the Oneidas' ownership of their Reservation was formally agreed to by the State in the 1788 Treaty of

**Affidavit in Support of Cross-Motion and in Opposition
to Defendants' Motion to Dismiss.**

Fort Schuyler, see Exhibit A, and guaranteed by the Federal Treaties and Laws invoked in the complaint.

10. The plaintiffs, as alleged in the complaint, have exhausted all remedies known to them. The Oneidas petitioned for justice to:

- The Governor of New York State (as provided in the 1788 Treaty with the State) (1967)
- The New York State Constitutional Convention (1967) [81]
- The President of the United States (as provided in the 1794 Treaty of Canandaigua) (1968)
- The Congress of the United States (1970).

As shown in the plaintiffs' affidavits filed herewith, the plaintiffs' efforts to get justice have been repeated over a long period of time. In all these cases no help was given to the Oneidas. The Petition to the President was denied, after conferences with the Department of Interior, because of a conflict of interest; if the U.S. helped the Oneidas, it might jeopardize its case in the Indian Claims Commission.

11. The complaint clearly states a cause of action for the relief demanded therein. The facts stated are true. The laws are clear. The treaties are the law of the land and contain covenants which should be kept. The relief sought is not drastic or unfair.

SUMMARY

The defendants motion should be dismissed and this case should proceed to trial on the amended complaint.

s/ GEORGE C. SHATTUCK

(Sworn to November 17, 1970).

**Exhibit A — Treaty of 1788
attached to Supporting Affidavit.**

**AGREEMENT BETWEEN NEW YORK AND THE ONEIDA INDIANS
CALLED A TREATY CONCLUDED AT FORT SCHUYLER IN 1788
(N. Y. Leg. Doc. No. 51, 1889, pp. 237-241).**

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas—it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tianaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Cane-sage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cul-

Exhibit A - Treaty of 1788 attached to Supporting Affidavit.

tivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge indians and their posterity forever are to enjoy their

Exhibit A - Treaty of 1788 attached to Supporting Affidavit.

settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people

Exhibit A - Treaty of 1788 attached to Supporting Affidavit.

of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square, wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation, and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)

Exhibit A - Treaty of 1788 attached to Supporting Affidavit.

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Witnesses present.

The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneidas may make leases as aforesaid) in the third line of the fourth article being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleecker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,
Miss'y & Interpreter.

J. B. CHRS. DEST,
Trys.

ABM. ROSEKRANTZ,
SIMEON DEWITT,
Surv. Genl.,

SAMUEL LATHAM MITHCELL,
JOHN TAYLER,
WM. COLBRATH.

NOTICE OF MOTION AND MOTION TO DISMISS.

[88]

(SAME TITLE).

PLEASE TAKE NOTICE, that on the 23rd day of November, 1970, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, the County of Oneida, one of the defendants in this action, will move this Court at a motion term to be held at the Court Room in the Federal Building in the City of Utica, New York, for an order for summary judgment in favor of said defendant County of Oneida and against the plaintiffs, dismissing the complaint herein, together with the costs and disbursements incurred by said defendant in this action.

This motion is made upon the ground that there is no genuine issue as to any material fact and defendant County of Oneida is entitled to judgment as a matter of law on the following grounds:

1. The County of Oneida, as a political division of the State of New York, has not waived its immunity from suit;
2. There is no enabling act passed by the Legislature which permits this action to be maintained by the plaintiffs;
3. The plaintiffs have not complied with the requirements of the County Law and the General Municipal Law of the State of New York as to the requirements of giving notice of the claim and commencing an action thereon within one year and 90 days after the event upon which the claim is based;

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4. It appears on the face of the plaintiffs' complaint that the claim asserted did not accrue, if, in fact, it accrued at all, to plaintiffs within three years before the filing of this action and consequently the action is barred by the statute of limitations;

Notice of Motion and Motion to Dismiss.

5. The prolonged delay on the part of the plaintiffs in bringing the action has barred the suit under the defense of laches;
6. The Court does not have jurisdiction of the subject matter on the ground of diversity of citizenship as one of the parties plaintiff, namely the Oneida Indians of New York, are citizens of the same state as defendants.
7. The defendant County of Oneida has acquired title to the premises involved herein by adverse possession;
8. Defendant County of Oneida is a bona fide purchaser for value of said premises without notice of any adverse rights of others;
9. None of the acts set forth in the complaint that form the bases of the action were committed by defendant County of Oneida and accordingly, it is not a proper party to the action;
10. The plaintiffs did not own a fee title to the said premises as title was vested in the State of New York by virtue of its being the sovereign. The plaintiffs only had a right of occupancy and, therefore, the price paid under the treaty was adequate in the premises;
11. The plaintiffs have not exhausted their remedies under the treaty and the claim is still pending before the Federal Indian Claims Commission;
12. This motion is based on this notice and motion, the complaint filed herein with the attached exhibits, the affidavit of Richard A. Frye, Esq. attached hereto and the memorandum of points and authorities filed herewith.

Affidavit in Support of Motion for Summary Judgment.**Dated: November 5, 1970.****s/ RICHARD A. FRYE****Attorney for Defendant County
of Oneida****Office and Post Office Address
Oneida County Office Building
800 Park Avenue
Utica, New York 13501
Telephone (315) 798-5910****TO:****[90]****BOND, SCHOENECK & KING, ESQS.****Attorneys for Plaintiffs****Office and Post Office Address****1000 State Tower Building****Syracuse, New York 13202****Telephone (315) 422-0121**

**AFFIDAVIT IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT.****[91]****(SAME TITLE).****STATE OF NEW YORK)****County of Oneida)****ss.:****RICHARD A. FRYE, being duly sworn, deposes and says:**

1. He is the Oneida County Attorney and as such is familiar with the proceedings of this action. He makes this affidavit in support of a motion for summary judgment on the grounds set forth in the notice of motion and motion.

2. The action herein was commenced by the service of a summons and complaint upon defendant, County of

Affidavit in Support of Motion for Summary Judgment.

Oneida (hereinafter called the "County"), on or about the 9th day of February, 1970. Thereafter, on the 28th day of July, 1970, an amended complaint was served.

3. A number of extensions of time in which to answer have been granted by the attorney for the plaintiffs and, consequently, an answer has not as yet been interposed on behalf of the County and time to do so has not expired.

4. The complaint alleges that plaintiffs, by a treaty with the State of New York in 1788, ceded most of their lands in New York to the State with the exception of certain lands of about 300,000 acres which were reserved. It is further alleged that by a subsequent treaty in 1795, the plaintiffs then transferred a large part of the reserved lands to the State.

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5. The gravamen of the complaint is that the transfer in 1795 was invalid because the treaty did not comply with federal statute (1 Stat 329, 1793) in that no federal consent was obtained and no United States Commissioner was present. The other main basis for the cause of action is that the agents of the State misrepresented the value of the land and induced the plaintiffs to sell for an inadequate price.

6. The County is brought into the action solely on the ground that it subsequently became the owner of portions of the lands deeded to the State in 1795. Plaintiffs demanded of the County the rental value of the said premises. It should be noted that the premises allegedly owned by the County are not specifically identified nor is any basis of value presented. It also appears at this state of the proceeding that the only lands owned by the County that are the subject of this action are public highways open for the use of people including plaintiffs and should not be subject to rent.

7. The County is immune from liability as a political

Affidavit in Support of Motion for Summary Judgment.

subdivision of the State of New York. Under Section 53 of the County Law of New York, each County in the State is liable for the torts of its officers, agents and employees under the same rules of law applicable to the State. Originally, under Common Law, the State, being sovereign, was immune from suit. Under Section 8 of the New York Court of Claims Act adopted in 1939, the State has generally waived that immunity and consented to have liability determined by the same rules of law applying to actions against individuals or corporations provided, however, that certain limitations in the article are met. However, the State has not wholly waived its immunity but only where an individual or corporation would be required to answer to an action for the same thing. The right to enter into a treaty with plaintiffs is an attribute that could only be possessed by a sovereign and not by an individual and, therefore, the waiver of immunity does not apply to this action. Since the County, under Section 53 of the County Law, is only liable under the same rules applicable to the State, it has not waived its immunity either.

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8. The first State statute waiving immunity, even in a limited manner, was passed in 1929, more than 100 years after the acts that form the basis of the cause of action herein. Those said acts occurred, therefore, at a time when the State and its political sub-divisions were immune from suit. It cannot be said that the State has waived its Common Law immunity retroactively to that time.

9. No enabling act has been passed permitting the plaintiffs to maintain the suit, which act is necessary in the absence of any waiver of immunity.

10. Even if we are to assume that the State waived its immunity as to this cause of action, any such waiver is conditional upon certain requirements being met as to notice and filing claims. Under Section 52 of the County Law,

Affidavit in Support of Motion for Summary Judgment.

any claim against a County must be made and served in compliance with Section 50-e of the General Municipal Law of the State of New York which in turn requires that a notice of claim be given within 90 days after the claim arises. Section 52 also provides that every action on such claim must be commenced pursuant to Section 50-i of the General Municipal Law which in turn requires that the action be commenced within one year and 90 days after the happening of the event upon which the claim is based. Manifestly, none of these requirements have been met by the plaintiffs. In addition, Section 52 states that the place of trial shall be in the County against which the action is brought.

11. The cause of action herein is barred by the statute of limitations. Since there is no general federal statute of limitations, the Federal Courts have applied State Law as to the period of limitation. Under Section 214 (4) CPLR an action to recover damages for injury to real property must be commenced within three years after the cause of action accrued. Injury to property has been held to not necessarily mean a physical injury but includes any act in invasion of one's property rights and refers to an action grounded in tort. The cause of action herein accrued at the time of execu-

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tion of the treaty, long before commencement of the action.

12. Even if there were no applicable statutes of limitations, the plaintiffs' action would be barred on the ground of laches. The plaintiffs had knowledge of the existence of the facts that form the basis for the action at the time they occurred or might have acquainted themselves with them by the use of reasonable diligence shortly thereafter. It would be inequitable at this stage in history to allow them to assert alleged rights after a lapse of time so great that the County would be severely prejudiced by their neglect. The County having no knowledge that such alleged rights

Affidavit in Support of Motion for Summary Judgment.

would be asserted has acquired lands, and made improvements thereon on behalf of its citizens, title to which would be affected by this suit. Also, the County would be obviously prejudiced by a suit at this late date because of the loss of evidence and the unavailability of witnesses with personal knowledge of the treaty, the lands involved, the consideration paid and the circumstances surrounding the negotiations regarding the treaty.

13. The Court does not have jurisdiction of the action on the ground of diversity of citizenship as alleged in the complaint because the Oneida Indians of New York, one of the plaintiffs, are citizens of the State of New York by virtue of their residence here and, therefore, are citizens of the same State as the defendants. It has been held that complete diversity is required by the statute, that is, all of the plaintiffs must be citizens of a State or States different from any of the defendants, and common citizenship, as found here, destroys the diversity.

14. The lands that are the subject of the action have been held by the defendants and their predecessors in title for some 175 years in actual, open, hostile, notorious, continuous and exclusive possession under claim of right and, therefore, title has vested in defendants by adverse possession.

15. Any claim to said premises by the plaintiffs is void as against defendants who are bona fide purchasers who have acquired said lands in good faith, either by purchase or condemnation, and have paid a valuable

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consideration without notice of any adverse right of others.

16. The bases for the action are that the State of New York did not conform to Federal Law at the time it purchased the lands in question by treaty and that the State misrepresented the value of the said lands and was thus able to pay an inadequate price. There is no allegation

Affidavit in Support of Motion for Summary Judgment.

that the County was a party to the treaty or made any misrepresentations. As a matter of fact, the County of Oneida was not even in existence until 1798. The plaintiffs are attempting to have the County respond in money damages for the alleged wrongful acts of the State. Manifestly, the State of New York should be the defendant herein.

17. The price paid by the State for the land cannot be compared to the prices paid by settlers as evidence of fraud or misrepresentation. The Indians did not actually own the lands used by them. The title to all vacant and unappropriated lands within the thirteen original states was vested in each State. The Indians had only a right of occupancy subject to the superior title in fee of the sovereign. As an historical fact, they did not settle the land as we know it and claim or reduce any particular part of it to ownership. Since most of it was used sporadically for hunting and fishing, the value of it to them was not the same as the value to the settlers who intended to farm it and build on it. Therefore, the price paid by settlers and developers cannot be equated to the value of the land to the Indians evidenced by the price paid to them. Since the State was not paying for a fee title since it already had that as a sovereign but was only paying for possession and the acknowledgement of their superior title, the price was completely adequate.

18. The Complaint alleges that both Federal and State treaties provide that the Indians are to ask the help of the United States and the State before taking any action on their own. There is no allegation that the plaintiffs have exhausted such remedies. Upon information and belief, the contrary appears true as there is still a proceeding for redress pending before the Federal Indian Claims Commission.

[96]

19. Based on the foregoing, it is respectfully submitted that the Motion for Summary Judgment in favor of

Affidavit of Jacob Thompson.

defendant, County of Oneida, dismissing the plaintiffs' complaint, should be granted together with such other and further relief as to the Court may seem just and proper in the premises.

s/ RICHARD A. FRYE
Oneida County Attorney

(Sworn to November 5, 1970).

AFFIDAVIT OF JACOB THOMPSON.

[104]

(SAME TITLE).

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JACOB THOMPSON, being duly sworn, deposes and says that:

1. I reside on the Onondaga Reservation at Nedrow, New York, and I am President of the Oneida Indian Nation of New York, one of the plaintiffs in the above action.

2. Based upon my extensive research into the history of the Oneida Indians and based upon the tradition that has been handed down from generation to generation, I can state that the Oneida Indians have been deprived and are being deprived of their legal rights, privileges and immunities as promised by the laws and treaties of the United States. The Oneida Indians have been deprived of their property by unjust acts of the State of New York and the laxity of the federal government in its guardianship of the Oneida Indians. The Oneida Indians, because of their status as a minority race or nation, have been deprived of capacity to bring action in the courts of New York State to redress their grievances.

Affidavit of Jacob Thompson.

3. In behalf of the Oneida Indians of New York, in my capacity as President thereof, I claim the protection and jurisdiction of this Court, pursuant to Section 1983 of 42 USCA which reads as follows:

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"§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

s/ JACOB THOMPSON

(Sworn to November 18, 1970).

**ORDER GRANTING LEAVE TO AMEND
COMPLAINT, Filed 12-4-70.**

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(SAME TITLE).

This cause coming on to be heard upon the plaintiffs' motion for leave to file an amendment to their complaint herein and for an order that this cause be heard upon the plaintiffs' complaint as thus amended, and it appearing that justice requires that their motion be granted, and this Court being fully advised,

IT IS ORDERED, that the complaint herein be amended so that paragraph 2 thereof shall read as follows:

"2. The matter in controversy exceeds, exclusive of interests and costs, the sum of \$10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

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and it is further

ORDERED, that defendants' motion to dismiss the complaint be deemed made against the complaint as so amended.

Dated, December 2, 1970

s/ EDMUND PORT
United States District Judge

**MEMORANDUM - DECISION AND ORDER OF
JUDGE PORT, Filed 11-11-71.**

[138]

(SAME TITLE).

APPEARANCES:

BOND, SCHOENECK & KING

Attorneys for Plaintiffs

1000 State Tower Building

Syracuse, New York 13202

GEORGE C. SHATTUCK, Esq.

Of Counsel

RICHARD A. FRYE, ESQ.

Attorney for Defendant County of Oneida

Oneida County Office Building

Utica, New York 13501

WILLIAM L. BURKE, ESQ.

Attorney for Defendant County of Madison

29 Lebanon Street

Hamilton, New York 13346

EDMUND PORT, Judge

Memorandum-Decision and Order

This case is before the court on motions made by the defendants for summary judgment dismissing the plaintiffs' complaint.

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Approximately ten different grounds are asserted. Since I have concluded that the complaint must be dismissed for lack of subject matter jurisdiction, it will not be necessary to consider the other grounds urged by the defendants for dismissal.

A brief statement of the procedural posture of the case will help bring the jurisdictional problem it presents into focus. The complaint was amended on two occasions: the first amendment, as of right,¹ added a second cause

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

of action. The second amendment resulted from the granting of plaintiffs' cross motion to amend and enlarge the jurisdictional allegations. The plaintiffs' original complaint based jurisdiction solely upon diversity of citizenship. Upon argument of defendants' motion for summary judgment dismissing the complaint, the plaintiffs were granted leave to amend the jurisdictional allegations of the complaint to read as follows:

"2. The matter in controversy exceeds, exclusive of interests[sic] and costs, the sum of \$10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA, pursuant to 28 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

THE FACTS

The plaintiffs allege that in 1795, by a treaty negotiated

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between representatives of the plaintiffs and of the State of New York, 100,000 acres of land within the defendant counties, owned by the plaintiffs from time immemorial, was deeded to the State of New York. Plaintiffs allege that they were induced to sell the land by reason of fraud practiced on them by the State of New York. They further allege that the conveyance to the State of New York was violative of earlier treaty obligations of the United States and of the Indian Nonintercourse Act of 1790.²

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

The crux of plaintiffs' complaint is embodied in paragraph 22 of the first amended complaint, which reads as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements.³ By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000.00, exclusive of costs and interest.

No purpose would be served trying to tack a name on the cause of action asserted, since, except for the question of civil rights jurisdiction, the jurisdictional issues will be decided independently of the name given to the claim alleged.

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JURISDICTIONAL BASES

DIVERSITY OF CITIZENSHIP

Since there is no disputing the New York citizenship of the defendant counties,⁴ the plaintiffs, in order to preserve the required complete diversity,⁵ contend that plaintiff Oneida Indian Nation of New York State (Oneida Indians of New York) is not a citizen of New York State within the meaning of 28 U.S.C. §1332.⁶

In support of this claim, they analogize the Oneida Indians of New York, an unincorporated Indian tribe, to an unincorporated labor union, which they contend under the

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

holding of United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.,⁷ is not a "citizen" for diversity purposes. Plaintiffs' reading of this case is myopic. While an unincorporated association is not a citizen, per se, in the same sense as a corporation, the question considered and answered by the Court in the negative was "whether an unincorporated labor union is to be considered as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members."⁸

Using the standard of the citizenship of its members to determine the citizenship of the tribe results in New York citizenship for diversity purposes. The individual members of the Oneida Indians of New York are citizens of the United States⁹ domiciled in New York and are consequently citizens of New York State for diversity purposes.¹⁰

Recognizing that "diversity is broken"¹¹ if the analogy

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to an unincorporated labor union is carried to its logical conclusion because "some of the members of the Tribe are residents of New York * * *,"¹² plaintiffs carry the analogy only to that point at which the unincorporated association per se has no citizenship. They distinguish the Indian tribe from other unincorporated associations because the Indian tribe "has an independent sovereignty of its own"¹³ and "is a nation within a nation"¹⁴ with whom "[t]he United States for almost a century made formal treaties * * *."¹⁵ This argument loses sight of the fact that for the last century, recognition has been denied to any Indian nation or tribe "as an independent nation, tribe, or power with whom the United States may contract by treaty."¹⁶

The plaintiff has not specifically asserted jurisdiction under 28 U.S.C. §1332(a)(2) or (a)(3).¹⁷ However, even if its independent nation theory were urged as a ground for

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

asserting jurisdiction under these subdivisions, the argument would fail. Even before the Act of March 3, 1871, the Supreme Court had held that Indian nations or tribes are not foreign nations for federal jurisdictional purposes.¹⁸

FEDERAL QUESTION JURISDICTION

Federal question jurisdiction will be considered under 28 U.S.C. §§1331¹⁹ and 1362.²⁰ No question has been raised as to the qualifications of the plaintiffs as Indian tribes "with a governing body duly recognized by the Secretary of the Interior * * *."²¹ Nor is there any question that the amount in controversy exceeds \$10,000.00. This leaves as the only open question whether

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"the matter in controversy arises under the Constitution, laws or treaties of the United States."²²

Determining whether a complaint states a claim "arising under" the Constitution, treaties, or laws of the United States is usually not an easy undertaking. Despite the problems of construction posed by "arising under," the Court of Appeals for this circuit has distilled from a long line of cases criteria for "testing the complaint for sufficient assertion of a federal question * * *."²³

Whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred" from federal law, or whether a properly pleaded "state-created" claim itself presents a "pivotal question of federal law," for example because of an act of Congress must be construed or "federal common law govern[s] some disputed aspect" of the claim.²⁴

In addition to this test, a number of general principles have become well established. The federal question must appear on the face of a well-pleaded complaint.²⁵ It is not enough that the allegations show the likelihood of a

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

question arising under federal law at some later juncture in the lawsuit.²⁶ Similarly, a case does not "arise under" federal law if the complaint merely anticipates a defense which involves federal law.²⁷ Nor does a suit "arise under" a law renouncing a defense * * *."²⁸ A case "arises under" federal law when the well-pleaded complaint "discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress."²⁹

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Shorn of all non-essential allegations, the complaint in this case is seeking damages for defendants' use and occupancy of land. This cause of action, regardless of the label it is given, is created under state law and requires only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. None of these essential allegations calls into question the Constitution, treaties, or federal law.³⁰ The local property rights of numerous land owners within Madison and Oneida Counties, it seems to me, should be decided by the application of state law.³¹

Unlike a suit to remove a cloud on a title, the complaint in the present type of action need not allege the existence and invalidity of the instrument under which the defendant claims title.³² It may well be that 25 U.S.C. §177 or the Treaty of 1795 could be called into question during the course of litigation, but such introduction would serve only to renounce a defense that title or right of possession to the land in question vested in New York State. The possible necessity of interpreting §177 or the Treaty in connection with a potential defense is insufficient to sustain federal question jurisdiction.³³

Clearly, §177 does not create the remedy sought to be enforced in this lawsuit. The sole remedy of that section is a penalty provision in favor of the United States. Nor is this a case where the remedy sought may be inferred

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

from federal law.³⁴ The complaint, stripped of all surplusage, does not present a "pivotal question of federal law."

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The complaint must also fail for failing to allege facts which give this court jurisdiction under the remaining part of the McFaddin test. While Title 25 of the United States Code, as well as other laws, the Constitution and treaties, evidences a concern for the protection of Indians,³⁵ there is little evidence that Congressional policy demands that this type of action be heard in a United States District Court. The action here calls for a state remedy granted, if at all, under state law, not under federal common law.

CIVIL RIGHTS JURISDICTION

That jurisdiction does not lie under 28 U.S.C. §1343 and 42 U.S.C. §1983 requires little discussion. No matter how the plaintiffs attempt to dress it up, the complaint alleges "an action addressed solely to the taking of property"³⁶ which does not support jurisdiction under the quoted sections.³⁷ And if by some stretch of the imagination plaintiffs were to get over this hurdle, the fact that the Civil Rights Act does not apply to suits against municipalities would present an insurmountable barrier.³⁸

For the reasons herein, it is

ORDERED, that the defendants' motion to dismiss the complaint be and the same hereby is granted for lack of subject matter jurisdiction.

s/ EDMUND PORT
United States District Judge

Dated: November 9, 1971
Auburn, New York

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

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FOOTNOTES

¹ Fed. R. Civ. P. 15(a).

² 1 Stat. 137, now 25 U.S.C. §177 (1964).

³ Since the treaty of 1795 dealt with 100,000 acres within the Counties of Oneida and Madison, and since the claim against the defendants relates only to "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements," it is obvious that there are, of necessity, numerous other parties, occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom like claims could be made.

⁴ Cowles v. Mercer County, 74 U.S. 118 (1868); Brown v. Marshall County, Kentucky, 394 F.2d 498 (6th Cir. 1968).

⁵ Strawbridge v. Curtiss, 7 U.S. 159 (1806).

⁶ 28 U.S.C. §1332 (1964). This section reads, in pertinent part, as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between--

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

⁷ 382 U. S. 145 (1965).

⁸ Id. at 147 (emphasis added).

Memorandum-Decision and Order of Judge Port,
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⁹ 8 U.S.C. §1401 (1964). See also U.S. Const., amend XIV, §1.

¹⁰ See U.S. Const., amend XIV, §1; Pemberton v. Colonna, 290 F.2d 220 (3rd Cir. 1961). See also Matter of Heff, 197 U.S. 488 (1905); Meeks v. McAdams, 390 F.2d 650 (10th Cir. 1968); Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), cert denied 382 U.S. 986 (1966).

¹¹ Plaintiffs' Brief on Issue of Jurisdiction, dated Dec. 18, 1970 at p. 6.

¹² Id.

¹³ Id.

¹⁴ Id.

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¹⁵ Id.

¹⁶ 25 U.S.C. §71 (1964), derived from Act of Mar. 3, 1871, C. 120, §1, 16 Stat. 566.

¹⁷ 28 U.S.C. §§1332(a)(2), (a)(3) (1964). These subsections are set forth in note 6, supra.

¹⁸ Cherokee Nation v. State of Georgia, 30 U.S. 1 (1831).

¹⁹ 28 U.S.C. §1331 (1964). This section, in pertinent part, reads as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

20 28 U.S.C. §1362(added Pub. L. 89-635, §1, Oct. 10, 1966, 80 Stat. 880). This section provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

21 Id.

22 Id.; 28 U.S.C. §1331 (1964).

23 McFaddin Express, Incorporated v. Adley Corporation, 346 F.2d 424, 425 (1965), cert. denied 328 U.S. 1026 (1966).

24 Id. at 426. See also Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); T.B. Harms Company v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied 381 U.S. 915 (1965).

25 Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894).

26 Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

27 Id.; Hopkins v. Walker, 244 U.S. 486 (1917).

28 Gully v. First Nat. Bank, 299 U.S. 108, 116 (1936).

29 Hopkins v. Walker, supra at 489.

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30 See Taylor v. Anderson, 234 U.S. 74 (1914); Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929).

Memorandum-Decision and Order of Judge Port,
Filed 11-11-71.

31 See note 3, supra.

32 Compare Hopkins v. Walker, supra.

33 See Gully v. First Nat. Bank, Supra.

34 See Wheeldin v. Wheeler, 373 U.S. 647 (1963).

35 Insofar as the plaintiffs may be entitled to redress against the United States, a claim is not pending before the Indian Claims Commission. See Exhibit, attached to Plaintiffs' Reply Brief on Issue of Jurisdiction; Defendant County of Oneida's Supplemental Brief, p. 5.

36 Eisen v. Eastman, 421 F.2d 560, 564 (2d Cir. 1969), cert. denied 400 U.S. 841 (1970).

37 Id.

38 Monroe v. Pape, 365 U.S. 167 (1961). See also United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3rd Cir. 1969), cert. denied 396 U.S. 1046 (1970).

NOTICE OF APPEAL, Filed 11-26-71.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

**THE ONEIDA INDIAN NATION OF NEW YORK STATE,
also known as the ONEIDA NATION OF NEW YORK,
also known as the ONEIDA INDIANS OF NEW YORK,
and the ONEIDA INDIAN NATION OF WISCONSIN,
also known as the ONEIDA TRIBE OF INDIANS OF
WISCONSIN, INC.,**

Plaintiffs,

-vs-

**THE COUNTY OF ONEIDA, NEW YORK, and THE
COUNTY OF MADISON, NEW YORK,** Defendants.

Civil Action No. 70-CV-35

Notice is hereby given that THE ONEIDA INDIAN NATION OF NEW YORK STATE and the ONEIDA INDIAN NATION OF WISCONSIN, the plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the order and judgment granting defendants' motion to dismiss entered in this action on the 11th day of November, 1971.

November 22, 1971.

s/ GEORGE C. SHATTUCK

George C. Shattuck, Partner
BOND, SCHOENECK & KING
Attorneys for Plaintiffs
Office and P. O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone [315] 422-0121

Notice of Appeal, Filed 11-26-71.

TO:

RICHARD A. FRYE, ESQ.
Attorney for Defendant County of Oneida
Oneida County Office Building
Utica, New York 13501

WILLIAM L. BURKE, ESQ.
Attorney for Defendant County of Madison
29 Lebanon Street
Hamilton, New York 13346

**NOTICE OF MOTION AND MOTION FOR LEAVE
TO APPEAL IN FORMA PAUPERIS.**

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(SAME TITLE).

PLEASE TAKE NOTICE that on December 14, 1971, at 9:30 A. M., or as soon thereafter as counsel can be heard, THE ONEIDA INDIAN NATION OF NEW YORK STATE and THE ONEIDA INDIAN NATION OF WISCONSIN, plaintiffs, will move the Court, pursuant to 28 U.S.C. §1915, at the United States Court House, Syracuse, New York, as follows:

For an order allowing them to prosecute an appeal from the judgment in this action entered on November 11, 1971 without prepayment of costs or fees or the giving of security therefor and for an order requiring the United States to pay for the expense of supplying all designated original papers and a transcript of all designated portions of the evidence and proceedings.

This motion is based on the attached affidavit of Jacob Thompson, President of the Oneida Indians of New York.

Dated: November 30, 1971

s/ GEORGE C. SHATTUCK
George C. Shattuck, Partner
BOND, SCHOENECK & KING
Attorneys for Plaintiffs
1000 State Tower Building
Syracuse, New York 13202
Telephone [315] 422-0121

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

(SAME TITLE).

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STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

JACOB THOMPSON, being duly sworn, deposes and says:

1. I am the President of the Oneida Indians of New York, one of the plaintiffs in this action.

2. The plaintiffs in this action believe it to be in their interests to take an appeal from the judgment dismissing the complaint in this action entered on November 11, 1971 and tender herewith a copy of the notice of appeal. Such notice was filed and served by mail on November 26, 1971.

3. I believe that the plaintiffs are entitled to a reversal of the judgment on the following grounds:

A. The plaintiffs' complaint was dismissed on the grounds that the Court lacks jurisdiction under 28 U.S.C. §§1331, 1343, and 1362. This is the issue which will be appealed.

B. I have reviewed material submitted by our counsel on the legislative history of 28 U.S.C. §1362, and I believe that this indicates a clear Congressional intent that there be jurisdiction in a case like ours, where the United States refuses to commence the action in the Indians' behalf. The correspondence with the United States Department of The Interior, annexed as Exhibits A, B, and C hereto, shows clearly that the

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United States refuses to assist the Oneida Indians because of an alleged conflict of interest.

C. I believe our case has great merit because Indians are barred from the courts of New York State in such

**Affidavit in Support of Motion for Leave
to Appeal in Forma Pauperis.**

claims and because of precedent in other federal court cases, including the decision of the Second Circuit Court of Appeals in the Tuscarora case cited in the plaintiffs' briefs.

D. As further evidence of the good faith and the substantial nature of this appeal, I attach as Exhibit D a copy of an inter-office memorandum to Arthur Gajarsa, Assistant to the Commissioner of Indian Affairs. This memo states in part;

"However, assuming that damages of \$10,000 or more are sought, it seems fairly clear that the interpretation of 25 USCA 177 is involved and this should be sufficient for the court to retain jurisdiction."

4. The plaintiffs are unable to pay the court fees and other costs, or the expenses connected with the preparation of the record on appeal necessary to prosecute the appeal. Plaintiffs are unable to give security for court costs and fees. The Oneida Indians of New York currently have the sum of \$18.00 in their treasury and an income of \$75 per year for a power pole easement over our remaining land in Oneida County. We expect to receive a settlement from the Consolidated Gas Supply Corp. for damage to said land but the disposition of this case is currently entangled in the bureaucracy of the Bureau of Indian Affairs. A pending settlement of a claim against the United States will be distributed to individual Indians and will not be an asset of the tribe as such. In short the Oneida Indians of New York lack sufficient funds to prosecute the appeal in this case.

5. I have talked by telephone with a representative of the Oneida Indians of Wisconsin, Inc, the other plaintiff, concerning their financial affairs. It is reported to me that they, as a tribe, are in a like financial situation.

**Affidavit in Support of Motion for Leave
to Appeal in Forma Pauperis.**

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For the foregoing reasons, I respectfully request that the motion herein be granted and that the plaintiffs be allowed to appeal in forma pauperis.

s/ JACOB THOMPSON

Jacob Thompson, President
Oneida Indians of New York

(Sworn to December 2, 1971).

**Exhibit A — Letter, dated 3-5-71
annexed to Supporting Affidavit.**

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 5 - 1971

Dear Mr. Shattuck:

Your January 18, 1971, letter correctly states the situation in which the Federal Government finds itself with respect to the Oneida claims against the State of New York. The Oneidas currently have pending claims against the United States which are based on the transactions on which the Oneidas wish to sue the State of New York; therefore the Government is not able to drop its defense and sue New York on behalf of the Indians.

We know of no authority for the United States to employ special counsel to represent the Oneida Indians in this matter. In this connection see 5 U.S.C. 3105 (Supp. V 1965). As you may know, there was introduced by the Administration in the last Congress a bill to provide for an Indian Trust Counsel Authority. Under this proposed legislation legal services in connection with Indian lands, water, and other natural resources would be provided Indians by the Federal Government independent of this Department and the Department of Justice. Such proposed legislation has been reintroduced in the present Congress and when enacted may provide the Oneidas an opportunity to obtain services such as you mention.

Sincerely yours,

Harrison Loesch

Assistant Secretary of the Interior

Mr. George C. Shattuck
Bond, Schoeneck & King
1000 State Tower Building
Syracuse, New York 13202

**Exhibit B — Letter, dated 1-18-71
annexed to Supporting Affidavit.**

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January 18, 1971

United States
Department of the Interior
Office of the Secretary
Washington, D. C. 20240

Attention: Mr. Harrison Loesch
Assistant Secretary

Re: Oneida Indians

Dear Mr. Loesch:

I received your letter of January 11 concerning a meeting on the Oneida Indians' problems. I think your letter and other recent correspondence clarifies something that has puzzled Mr. Thompson and us for some time.

As I now understand it, the Bureau of Indian Affairs and the Department of the Interior believe they cannot represent the Oneidas in the suit against New York because of a conflict of interest in respect of the claim against the United States before the Indian Claims Commission. This was never made clear to us before and of course your position is understandable.

Is there any way in which the United States could hire special counsel to represent its interest as guardian of the Oneida Indians?

Sincerely yours,

BOND, SCHOBNECK & KING

CCS/b

By

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**Exhibit C — Letter, dated 1-11-71
annexed to Supporting Affidavit.**

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**UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240**

JAN 11 1971

Dear Mr. Shattuck:

Since Mr. Thompson wrote you on November 12, 1970, concerning your request for a meeting in reference to the Oneida Indian problems, we have undertaken to see whether there have been any changes in the status of the Oneida claims which would make possible the action requested by your clients. As we understand the Oneida claims are still pending before the Indian Claims Commission, it does not look as though we can take such action. If, nevertheless, you and your clients wish to discuss the situation with me, please let me know.

Sincerely yours,

A handwritten signature in dark ink, reading "Harrison G. Slocum", is written over the typed name.

Assistant Secretary of the Interior

Mr. George C. Shattuck
Bond, Schoeneck and King
1000 State Tower Building
Syracuse, New York 13202

**Exhibit D — Memorandum
annexed to Supporting Affidavit.**

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IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

Memorandum

To: Arthur J. Gajarsa, Assistant to the Commissioner
From: Albert E. Kane, Program Adviser
Subject: Case of Oneida Indian Nation v. County of Oneida
pending in New York Federal Court

You have asked the sole question of whether the plaintiff, Oneida Indian Nation, has any standing to sue in the United States District Court for the Northern District of New York. My reply is in the affirmative.

Whether the Federal Court can retain jurisdiction depends on the allegations in the complaint which is not before us and which we are unable to obtain. Consequently, we can only hazard a guess. However, assuming that damages of \$10,000 or more are sought, it seems fairly clear that the interpretation of 25 USCA 177 is involved and this should be sufficient for the court to retain jurisdiction. As was said in Shelby County, Tennessee v. Fairview Homes, Inc., 285 F2d 617:

"It is well settled that a case may be said to arise under the Constitution or laws of the United States whenever its correct decision depends upon the construction of either, or when the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction."

In Zwickler v. Koota, 389 U.S. 241 (1967), the court also declared:

"Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims.... wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.... Though never interpreted by a state

Exhibit D - Memorandum annexed to Supporting Affidavit.

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court, if a state statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it. Any other course would impose expense and long delay upon the litigants without hope of its bearing fruit."

The gravamen of the complaint apparently is that through various treaties with the Indians, the United States obligated itself to protect and secure the Oneida lands in New York State and that it did not do so when the Oneidas were allowed to sell their lands to New York State without receiving adequate compensation therefor. The Indian Claims Commission decided (and its decision was affirmed by the Court of Claims) that the treaties vested no fiduciary responsibility in the United States but that 25 USCA 177 forbade the sale of Indian lands without the consent of the United States Government and thus the Government was required to protect the Indians against unfair treatment. However, there was not decided the question of whether this responsibility extended to transactions between New York State and its Indians. This question is now pending before the Indian Claims Commission where the Government has denied liability and its defense is being conducted by the Department of Justice. The Solicitor has declared that it would be inappropriate for the Government now to appear in another forum, whether a Federal or state court, to take the opposite view and support the claims of the Oneidas. (See memorandum of February 21, 1968, by Associate Solicitor of Indian Affairs to Assistant Secretary, Public Land Management, File No. E-67-1087.9a).

Many defenses to the claims of the Indians have been set forth and these have not been considered or passed upon as not being the subject of your inquiry.



Albert E. Kane
Program Adviser

**DEFENDANTS' OPPOSITION TO THE PLAINTIFFS'
MOTION FOR LEAVE TO APPEAL IN FORMA
PAUPERIS, Filed 12-13-71.**

(SAME TITLE).

[161]

Defendant County of Oneida herewith opposes plaintiffs' motion for leave to appeal in Forma Pauperis set for hearing on December 14, 1971, at 9:30 A. M., at the United States Court House, Syracuse, New York, on the following grounds and relying on the following authorities:

THE AFFIDAVIT SUPPORTING THE
APPLICATION MUST BE MADE NOT
ONLY BY THE APPELLANTS, BUT BY
EVERY PERSON HAVING A DIRECT
INTEREST IN THE RECOVERY.

The Oneida Indian Nation of New York State is an unincorporated Indian tribe made up of individual members who are domiciled in the State of New York. Any recovery in this action would have to be distributed to the individual members of the tribe and would not be an asset of the tribe as such. It has been held that where a plaintiff is suing in a representative capacity, it must also appear that the beneficiaries in whose interest the suit was maintained were also unable to pay the required costs. Clay vs. Southern Railway Company., 90 F 472.

In Chetkovich vs. United States, 47 F 2d 894, it was held

[162]

that in an application for relief to appeal in Forma Pauperis, an affidavit supporting the application had to be made by every person interested in the recovery.

In a suit by a widow as administratrix of the estate of her deceased husband, under a state statute awarding damages to the widow and to the children, it was

**Defendants' Opposition to the Plaintiffs' Motion
for Leave to Appeal in Forma Pauperis,
Filed 12-13-71.**

held that in an application for leave to appeal in Forma Pauperis, an affidavit had to show the inability of the children as well as the widow to pay costs. Reed vs. Pennsylvania Company, 111 F 714.

In construing a similar statute in New York State, the courts have held that where an applicant is one of many plaintiffs, then a motion for leave to appeal as a poor person will be denied in the absence of a showing that all of the plaintiffs are poor persons. Orlowski vs. St. Stanislaus Roman Catholic Church, 12 NYS 2d 350.

In plaintiffs' affidavit in support of motion, at paragraph 4 thereof, the plaintiffs set forth merely a cursory exposition of the financial affairs of the Oneida Indians of New York and gave no details at all as to the financial condition of the Oneida Indians of Wisconsin.

For the reasons set forth above, the plaintiffs' motion for leave to appeal in Forma Pauperis should be denied.

Dated: December 10, 1971.

s/ JOSEPH A. MARKASON
Special Assistant County Attorney
County of Oneida, Defendant
Office and Post Office Address
Oneida County Office Building
800 Park Avenue
Utica, New York 13501
Telephone No. 315-798-5910

TO:

BOND, SCHOENECK & KING, ESQS.

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ORDER OF JUDGE PORT, Filed 12-28-71.

[163]

(SAME TITLE).

Upon consideration of the plaintiffs' motion, and accompanying affidavit, for leave to prosecute their appeal in forma pauperis, it is

ORDERED, that said motion be and the same hereby is denied except that the bond on appeal is hereby dispensed.

Dated: December 20, 1971.

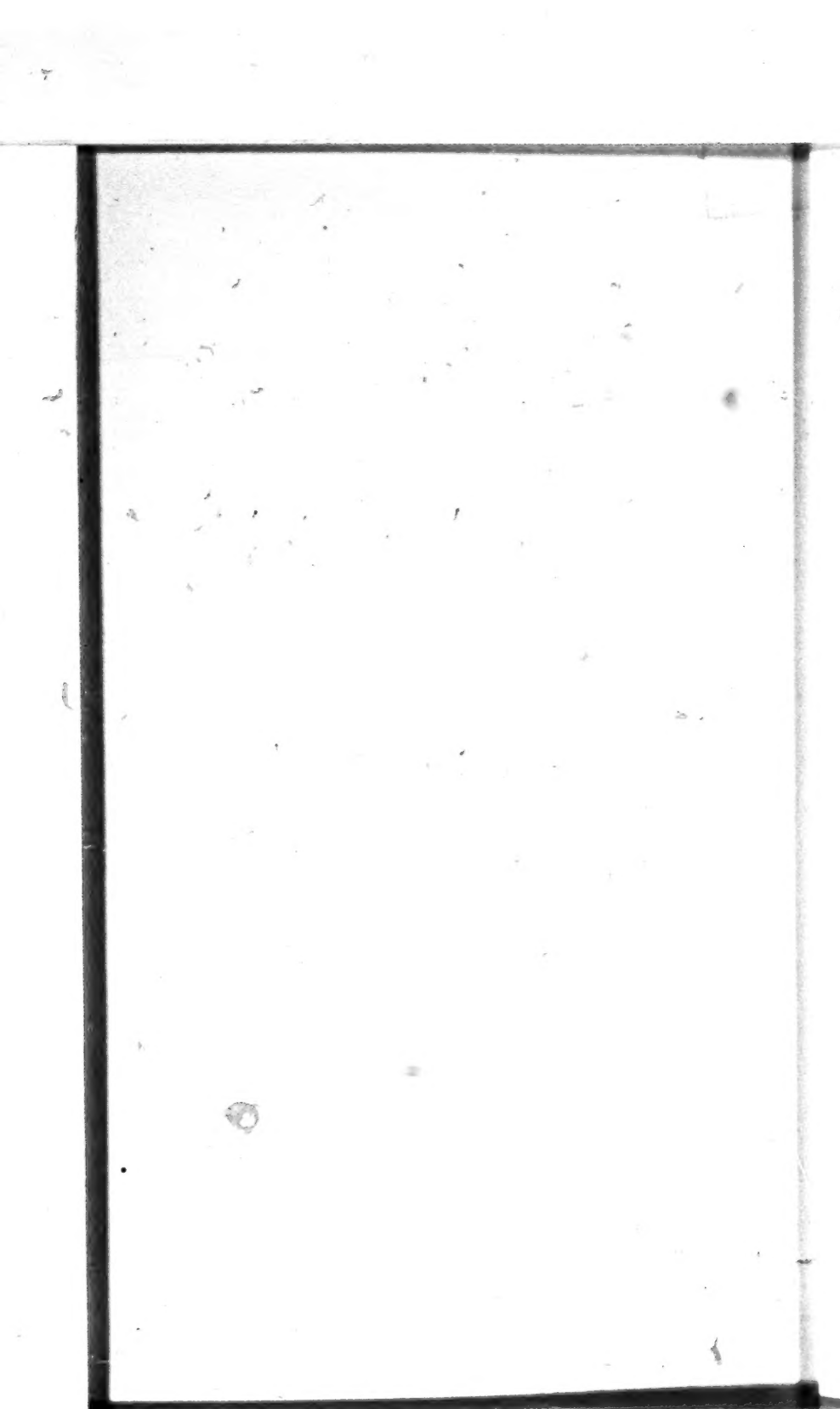
s/ EDMUND PORT
United States District Court Judge

Copy of Decision of Second Circuit Court of Appeals.

The decision of the Second Circuit Court of Appeals and the denial of petitioners' motion for rehearing appear in the Petition for Certiorari filed herein at pages 14 and 30, respectively.

Date of Grant of Writ.

On June 4, 1973, the Supreme Court of the United States took the following action herein: "The petition for a writ of certiorari is granted."



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IN THE
Supreme Court of the United States
October Term, 1972

Supreme Court, U. S.
FILED

DEC 9 1972

MICHAEL RODAK, JR., CLERK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known
as the ONEIDA NATION OF NEW YORK, also known as the
ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN
NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF
INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF
MADISON, NEW YORK,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

GEORGE C. SHATTUCK
BOND, SCHOENECK & KING
Attorneys for Petitioners
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IN THE
Supreme Court of the United States
October Term, 1972

No.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

The Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit and the dissenting opinion of Judge Lumbard (Appendix A, infra, p. 14) are reported at 465 F.2d 916 (1972). That Court's denial of the Petitioners' Petition for Rehearing and Suggestion for Determination by Court En Banc (Appendix B, infra, p. 30) is not yet officially reported. The opinion of the United States District Court for the Northern District of New York (Appendix C, infra, p. 31) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1972. The Oneida Tribes then filed a timely petition for rehearing, which was denied on September 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

I. When Congress enacted 28 U.S.C.A. 1362 (to extend the jurisdiction of the Federal District Courts to entertain suits brought by recognized Indian Tribes on questions arising under the Constitution, laws or treaties of the United States), did Congress intend to include in this jurisdictional grant claims by a recognized Tribe involving land of which the Tribe had been dispossessed in violation of federal law and treaties, which claims, pursuant to prior Congressional statutes, may not be litigated in a state court?

II. Does a cause of action, exclusively founded on United States treaties with an Indian Tribe and United States laws designed to protect and preserve treaty lands for the Indian Tribe, arise under the Constitution, laws and treaties of the United States?

STATUTES AND TREATIES INVOLVED

A. The Treaties Invoked

The complaint invokes the following treaties enacted pursuant to Article IX of the Article of Confederation and Article I, Section 8, of the Constitution (quoted in part):

Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

B. Statutes Invoked

25 U.S.C.A. 177

§177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to

the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. §2116.

25 U.S.C.A. 194

§194. Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. §2126.

STATEMENT

The Oneida Indian Nation of New York and The Oneida Indian Nation of Wisconsin brought this suit against the Counties of Oneida and Madison, located in the State of New York (Complaint, Appendix D, infra, p. 42 , Amended Complaints, Appendices D-1 and D-2, infra, pp. 62 & 63).

Petitioners contend that the respondents occupy lands which the State of New York obtained in 1795 in violation of the Indian Non-Intercourse Act, 1 Stat. 137 (1790),

later Rev. Stat. §2116, and now 25 U.S.C. §177. The 1790 Act provided, inter alia:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Prior to the contested cession in 1795, the Petitioners had a large Reservation in Upstate New York. In 1795, representatives of the State of New York negotiated a "treaty" with the Petitioners whereby the Petitioners ceded a large portion of their land, for what the complaint alleges to be an unfair and inadequate consideration. This 1795 "treaty" was obtained without federal consent and was never ratified in any way by the United States, and, consequently, was in violation of the above cited Indian Non-Intercourse Act and the treaties invoked in the complaint.

Petitioners in this suit claim damages for the respondents' occupancy of the petitioners' land for the period January 1, 1968 to December 31, 1969. The fair rental value of such premises for this period amounts to at least \$10,000.00 exclusive of interest and costs.

In the United States District Court for the Northern District of New York, petitioners asserted jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1362, and other jurisdictional provisions which the petitioners do not ask this Court to review.

The District Court dismissed the complaint for lack of jurisdiction. In affirming, the Court of Appeals reasoned that the complaint by the petitioners was an action "basically in ejectment" and therefore a well-pleaded complaint need not contain an allegation of the Oneidas' source of title. Consequently, held the Court, the action did not "arise under" the Constitution, laws, or treaties of the

United States (28 U.S.C. §1331), even though the petitioners' assertion of title in their complaint is founded on a federal statute or treaty. The Court of Appeals concluded that the "arising under" language of §1362 should be interpreted similarly to the "arising under" language of §1331, and hence under §1362 there was likewise no federal question. Judge Lumbard dissented, suggesting that the "arising under" language of §1362, passed into law in 1966, should not necessarily be interpreted as the same language in §1331. Judge Lumbard also noted that since the case would turn exclusively on interpretation of federal law and federal treaties, this case "should be considered to arise under the laws, as well as the treaties of the United States."

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals' decision, denying federal court jurisdiction in this case, will have a vital adverse impact on the availability of a judicial forum for Indian Tribes throughout the United States to litigate claims for lands of which they are dispossessed. Consequently, the decision is most appropriate for review by this Court. By concluding that an action does not "arise under the Constitution, laws or treaties of the United States" (28 U.S.C. §1362) when an Indian Tribe sues for land of which they were deprived in violation of federal law, the Court of Appeals effectively denied the petitioners and all other Indian Tribes with similar claims any judicial forum in which to litigate such claims.

Since the transaction challenged in this case occurred in 1795, the State Courts of New York are precluded from entertaining this suit. 25 U.S.C.A. §233, which granted to New York all civil jurisdiction over Indians and Indian Tribes, contains the following proviso:

"that nothing herein shall be construed as conferring jurisdiction on the courts of the State of New

York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

Similarly, Indian Tribes in other states cannot resort to state courts to protect Reservation lands. Sections 28 U.S.C.A. §1360 and 25 U.S.C. §1322 impose on certain states and permit other states to assume civil jurisdiction over actions to which Indians are parties. However, such statutes contain a proviso, like that in 25 U.S.C.A. 233, to the effect that the state jurisdiction therein authorized or imposed does not confer on the states jurisdiction to adjudicate the right or possession of property held in trust by the United States for Indians or property subject to a restriction against alienation imposed by United States law. (28 U.S.C. §1360(6); 25 U.S.C.A. §1322(6).) These statutes confirm prior case law precluding state courts from adjudicating claims involving Indian land. U.S. v. Minnesota, 305 U.S. 382, 59 S. Ct. 292 (1938); Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269 (1959).

The dire consequences of the decision below on Indian Tribes throughout the country necessitate a review of that decision by this Court and present a need for interpretation of 25 U.S.C.A. 1362.

The petitioners urge this Court review the legal assumption of the Court of Appeals that the "arising under" language of 28 U.S.C. §1362 must, of necessity, be subject to the case law interpreting the same language in 28 U.S.C. §1331.

The legislative history of 28 U.S.C. §1362 indicates that Congress intended to confer by §1362 a more generous grant of jurisdiction than the interpretation of the "arising under" language of §1331 permits.

On characterizing this suit under federal treaties and statutes as an "action in ejectment", because the petitioners were not in possession of the disputed land at the time

of the suit, the Court of Appeals then invoked the "well pleaded complaint" rule of 28 U.S.C. §1331 to dismiss the case. The Court reasoned that the petitioners' source of title (federal treaties) and their asserted breach of federal law (25 U.S.C. §177) need not be shown on the face of the complaint.

The petitioners contend that Congress did not intend the restrictive "well pleaded complaint" rule of §1331 to accompany the 1966 legislative enactment 28 U.S.C. §1362. Taken in the context of 25 U.S.C.A. 177, 194, and 233, and its own legislative background, section 1362 merits a broader interpretation of what is "arising under" the laws and treaties of the United States. U. S. Code Congr. & Adm. News 1966, pp. 3145-3149. For instance, the then Deputy Attorney General advised the Senate that the section would cover "actions to set aside patents". Id. p. 3149.

This Court has before declined to allow long-standing judicial interpretation of particular language to be automatically transposed as the interpretation of the same language in a different statute, particularly when the two statutes containing the same phraseology were enacted to achieve different goals. U.S. v. Davis, 370 U.S. 65, 82 S. Ct. 1190 (1962).

As Judge Lumbard concludes in his dissenting opinion, "§1331 has long been considered less generous than the constitutional grant." Compare Osborn v. Bank of United States, 9 Wheat. 738 (1824), with Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) and Louisville & Nashville R.R. Co. v. Mottley, 219 U.S. 467 (1911). Consequently, the "well pleaded complaint" rule as applied under 28 U.S.C. §1331 is not constitutionally required as the interpretation of 28 U.S.C. §1362.

Petitioners urge this Court review the automatic adoption by the Court of Appeals of the "well pleaded complaint" rule of 28 U.S.C. §1331 as the correct interpretation of

28 U.S.C. §1362. Petitioners believe the question is of broad national importance and that the interpretation of Judge Lumbard is correct.

II.

The complaint bases its claim on three federal treaties guarantying possession of Reservation land, on two federal statutes designed to protect Indian land, and upon federal policy as stated by the President of the United States. The treaties, statutes, and policy are invoked in and made a part of the complaint.

The petitioners' cause of action meets the tests of a federal claim set forth in International Association of Machinists v. Central Airlines, 372 U.S. 682, 83 S. Ct. 683 (1953), and Smith v. Kansas City Title and Trust Co., 255 U.S. 180, 41 S. Ct. 243 (1920); as more recently followed in Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F. 2d 486 (2 Cir. 1968). This is not a case where the federal aspect is remote or collateral, or blended with questions of state law. Here the petitioners are invoking the promised help of the United States in the form of a cause of action created basically by federal treaties and laws.

The Second Circuit has distinguished this case from a prior decision on similar facts, Tuscarora Nation of Indians v. Power Authority, 257 F. 2d 885 (2 Cir. 1958), on the ground that the Tuscarora Indians had possession and the Oneidas do not. While there is some question about whether the distinction is factually correct*, the thrust of the opinion below is that possession, or lack of it, is the key factor. It is petitioners' contention that an unlawful taking or acquisition of an Indian Tribe's possession does not of itself deprive such Tribe of the protection of federal treaties, laws and policies.

*The Tuscarora opinion indicates that the Indians therein had already lost their right to possession due to filing of a condemnation map under Section 30 of the New York Highway Law.

The question of whether possession must be alleged in a case under federal treaties guarantying possession represents an issue which affects the interests of Indians in every part of the United States. If the decision of the Court Below is correct, then it appears that an Indian Tribe or Nation, once ousted of possession of its Reservation, has no recourse to federal courts on its own behalf but must rely completely upon officials of the United States Government to present its case. As has been demonstrated in many cases, including the current one, the United States is unwilling or unable for one reason or another to help.

The Second Circuit's decision would leave American Indians without remedy if once ousted or removed from their lands. They would have no forum in which to present a plea for application of laws, treaties, and policy of the United States which guarantee them the possession of their lands.

The present vitality of the treaties invoked in the complaint was affirmed in 1960 by the Supreme Court in the Tuscarora controversy. The Supreme Court explicitly distinguished between the type of ownership of the Tuscarora Indians (not protected by treaty) and that of the Oneida Indians (protected by treaty) in Footnote 18, 362 U.S. 120, 80 S. Ct. U.S. 556, 557, (1960) as follows:

"By the Treaty of Fort Stanwix of 1784 (7 Stat. 15) and the unratified Treaty of Fort Harmar of 1780 (7 Stat. 33) with the Six Nations, the United States promised to hold the Oneidas and the Tuscaroras secure in the lands upon which they then lived—which were the lands in central New York about 200 miles east of the lands in question."

The Petitioners' Reservation involved herein is that very land "about 200 miles east" of the Tuscarora land. The treaties referred to in Footnote 18 are two of the three treaties invoked in the Petitioners' complaint.

The Supreme Court in Tuscarora went on to hold that

the condemnation of the Tuscarora land by the Federal Power Commission did not violate treaties because no treaty applied to protect the Tuscarora land in question. *Id.* 362 U.S. 124, 80 S. Ct. 558 (1960). It follows that the Oneldas' land is protected by the treaties invoked in the complaint and that such treaties create their own federal cause of action; or at least that the claim "arises under" the treaties.

A further important element of the law on federal court jurisdiction over New York Indians is found in 25 U.S.C.A. 233, which reads in part as follows:

"... nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

The foregoing clause was not in the bill (S. 192) as originally introduced in Congress. It was added at the request of certain New York Indians. See Congressional Record—House for July 27, 1950, page 11400. The explanation given by Congressman Morris therein shows clearly that Congress assumed that Indian land claims arising before September 13, 1952 could be heard in federal courts. See following excerpt:

"These amendments will preserve those -(treaty)-rights. Then in addition thereto they will preserve their right to go into the United States courts in regard to claims that they might have growing out of any transactions in regard to land dealings and so forth, with the State of New York. In other words, Mr. Speaker, I believe that these particular amendments are such that there can be no real objection now."

The Congressional Record—House for August 14, 1950, at page 12664, contains further explanation:

"In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision."

Therefore, Congress, in enacting 25 U.S.C.A. 233, clearly intended and believed that land claims involving New York Indian lands and dating prior to September 13, 1952 should be federal questions, to be heard by federal courts.

This assertion is reinforced by 25 U.S.C.A. 194, which was specifically pleaded in the Petitioners' complaint, paragraph 7. If neither the federal nor state courts have jurisdiction where the Indian is not in possession, what is the purpose of 25 U.S.C.A. 194, which refers to burden of proof in trials about the right of property "whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership"? [Emphasis added.]

It does not seem that Congress would have let 25 U.S.C.A. 194 remain on the books for 138 years to govern burden of proof in a cause of action that does not exist because of lack of possession.

The long history of federal treaties, laws, court decisions, and governmental activity in behalf of Indians makes it clear that the federal interest in the result of such (Indian) cases is so great they they should be controlled by federal common law. As stated by the Second Circuit in the Tuscarora case, at 257 F. 2d 885, 891:

"Not only has Congress not abandoned the field with respect to the property interests of Indian tribes

in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U.S.C.A. 233, pointed up and reaffirmed its paramount authority over Indian tribal lands." p. 891.

Petitioners believe the "nice pleading rules" are complied with herein because the complaint on its face shows why this is not a mere local ejectment action but rather a well-pleaded case arising under the:

- treaties: (see paragraph 4 of complaint);
- statutes: (see paragraphs 6 and 7 of complaint); and
- laws and policy: (see paragraph 5 of complaint)

of the United States as is required by 25 U.S.C.A. 1331.

Because so many Indian tribal and land rights are founded on federal treaties, the decision here will be of significance to many generations to come.

CONCLUSION

This petition presents questions regarding the scope of 28 U.S.C.A. 1362 and the efficacy of federal treaties; and these questions affect, and will affect, the integrity of Indian Reservation lands throughout the United States.

For the reasons set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE C. SHATTUCK
BOND, SCHOENECK & KING
Attorneys for Petitioners
One Lincoln Center
Syracuse, New York 13202

December 1, 1972.

Appendix A — Opinion of Court Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 720—September Term, 1971.

(Argued June 5, 1972

Decided July 12, 1972.)

Docket No. 72-1029

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

Appellants,

v.

**THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,**

Appellees.

Before:

**FRIENDLY, Chief Judge,
LUMBARD and MULLIGAN, Circuit Judges.**

Appeal from an order of the District Court for the Northern District of New York dismissing, for lack of federal jurisdiction, a complaint by two Indian nations challenging a 1795 sale of tribal lands as violating Indian treaties and the Indian Non-Intercourse Act, 1 Stat. 137 (1790), now 25 U.S.C. § 177.

Affirmed.

Appendix A — Opinion of Court Below.

GEORGE C. SHATTUCK, Esq., (Bond, Schoeneck & King, Syracuse, N. Y., of Counsel), *for Appellants.*

WILLIAM L. BURKE, Esq., Attorney for the County of Madison, Hamilton, N. Y., *for Appellee, County of Madison.*

ROCCO S. MASCARO, Esq., (Raymond M. Durr, Esq., Attorney for the County of Oneida, Utica, N. Y., of Counsel), *for Appellee, The County of Oneida.*

(Charles Donaldson, Esq., of Counsel, American Civil Liberties Union, Syracuse, N. Y.,

and

David H. Getches, Esq., and Peter J. Aschenbrenner, NATIVE AMERICAN RIGHTS FUND, Boulder, Colorado, of Counsel), *for Appellants, Amicus Curiae.*

FRIENDLY, *Chief Judge:*

This appeal from an order of the District Court for the Northern District of New York, dismissing a complaint by two Indian nations for want of federal jurisdiction, takes us back to the early days of the Republic. Although on the surface the controversy seems highly appropriate for federal cognizance, that claim shatters on the rock of the "well-pleaded complaint" rule for determining federal question jurisdiction, and we find no other basis that would permit a federal court to entertain the action.

The principal allegations of the complaint are as follows: The plaintiffs are The Oneida Indian Nation of New York State, and Indian Nation or Tribe with its principal

Appendix A — Opinion of Court Below.

reservation in Oneida and Madison Counties, New York, and The Oneida Indian Nation of Wisconsin, an incorporated Indian Nation or Tribe with its principal reservation in Wisconsin. The defendants are the two New York counties just mentioned. After alleging the required jurisdictional amount and diversity of citizenship,¹ the complaint dips into history. Prior to the American Revolution the Oneidas owned some 6,000,000 acres of land in central New York. In contrast to other New York Indian tribes, they fought on the side of the colonists. See U.S. Dept. of Interior, Federal Indian Law 966-67 n. 1 (1958) [hereinafter cited as Federal Indian Law]. In recognition of this, a number of treaties were made confirming them in the possession of their lands, except such as they had sold or might choose to sell.² To implement these and other treaty obligations, the first Congress adopted the Indian Non-Intercourse Act, 1 Stat. 137 (1790), later Rev. Stat. § 2116, and now 25 U.S.C. § 177. This provided, *inter alia*:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

¹ Following defendants' motion to dismiss the complaint on numerous grounds, one of which was lack of subject-matter jurisdiction, plaintiffs cross-moved to amend the complaint, see note 3 *infra*, F.R.Civ.P. 15(a), to allege that "Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws." Civil rights jurisdiction, 42 U.S.C. § 1983, 28 U.S.C. § 1343, was also alleged. The district court granted plaintiffs' motion to amend, and further ordered that defendants' motion to dismiss be deemed made against the amended complaint.

² See Treaty of October 22, 1784, 7 Stat. 15; Treaty of January 9, 1789, 7 Stat. 33; Treaty of November 11, 1794, 7 Stat. 44; Treaty of December 2, 1794, 7 Stat. 47. See Federal Indian Law 965, 970-72.

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President Washington explained the statute to a delegation of Seneca Indians as follows:

"Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

Prior to adoption of the statute, the Oneidas, in the Treaty of Fort Stanwix in 1788, between themselves and the State of New York, had ceded over 5,000,000 acres of their lands to New York State for what now seems an absurdly small consideration. They had reserved about 300,000 acres in Oneida and Madison Counties. In 1795 representatives of New York State procured the cession by "treaty," see Federal Indian Law 513 n.6; cf. *Seneca Nation v. Christy*, 162 U.S. 283 (1896), of a large portion of these lands, again for what now seems an inadequate consideration and allegedly was so even then. The complaint asserts that no federal consent was obtained, that no United States Commissioner was present at the negotiation or execution of the purported treaty, and that the United States has never approved or ratified it. Part of the premises deeded in 1795 became the property of the defendant counties which currently occupy them for buildings, roads or other public improvements. "By reason of such occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000.00, exclusive of costs and interest."³ Plaintiffs demanded judgment for at

³ The quoted language was added, in an amendment as a matter of course, F.R.Civ.P. 15(a), as ¶ 22 of plaintiffs' complaint; ¶ 18 of the original and amended complaints alleges in part that "By reason

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least \$10,000.00 "plus such other and further monetary damages as the Court may deem just."

Appealing from a dismissal of the complaint for lack of federal jurisdiction, the Oneidas assert three different bases—the existence of a federal question, diversity of citizenship and, surprisingly, a claim under the Civil Rights Act.

I.

As stated, on a surface reading the complaint would seem to state a claim which "arises under the Constitution, laws or treaties of the United States," 28 U.S.C. § 1331(a), or to institute an action "by an Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1362.⁴ Decision would ultimately turn on whether the deed of 1795 complied with what is now 25 U.S.C. § 177 and what the consequences would be if it did not.⁵ How-

of said occupancy [by defendants] plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least \$10,000, exclusive of costs and interest." Whether these claims are viewed as distinct causes of action, or simply as alternative statements of an appropriate measure of damages on the same cause of action, the outcome is equally unavailing to plaintiffs. While plaintiffs only claimed rental value for a two-year period, they sought to preserve their claim for rental value for both prior and subsequent years.

4 The jurisdictional issue in this case is the same under either section. Apart from the use of the same language as in § 1331, the legislative history makes clear that the sole purpose of § 1362 was to remove any requirement of jurisdictional amount. See 1966 U.S. Code Cong. & Adm. News 3145-49. The decision, *Yoder v. Assiniboin and Sioux Tribes of Fort Peck Indian Reservation, Mont.*, 339 F.2d 360 (9 Cir. 1964), which the statute aimed to overrule, involved a claim that would have been assertable under § 1331 but for the requirement of jurisdictional amount.

5 Although the complaint makes copious reference to various Indian treaties, see note 2 *supra*, which are indeed considered to constitute "treaties" within applicable jurisdictional legislation, *Worcester v.*

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ever, this alone does not establish the existence of federal question jurisdiction. "Under existing law it is well established that federal question jurisdiction is present only if the reliance on a federal right appears on the face of the well-pleaded complaint. The first Supreme Court decision to construe the Act of 1875 [creating general federal question jurisdiction] applied such a rule, citing *Chitty* to determine what Allegations were proper, *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877), and the rule has been insisted upon ever since." ALI Study of the Division of Jurisdiction between State and Federal Courts, Commentary on § 1311, p. 169 (1969). One effect of the rule is to bar "access to federal court on the basis of allegations which are not required by nice pleading rules," *Id.* at 169-70, notably in cases involving rights to land.

Although plaintiffs' only specific claims for relief are for two years' rental value as a result of defendants' occupancy, or damages for denial of plaintiffs' right of use, see note 3 *supra*, their success depends upon establishment of their right to possession, see *Willis v. McKinnon*, 178 N.Y. 451 (1904); *Crawford v. Town of Hamburg*, 19 App. Div. 2d 100, 241 N.Y.S.2d 357 (1963), and the action is thus basically in ejectment. As to this, a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no federal question even when a plaintiff's claim of right or title is founded on a federal statute, patent or treaty. *Florida Central Railroad v. Bell*, 176 U.S. 321 (1900); *Filhiol v. Maurice*, 185 U.S. 108 (1902); *Filhiol v. Torney*, 194 U.S. 356 (1904); *Taylor v. Anderson*, 234 U.S. 74 (1914); *White v. Sparkhill Realty Corp.*, 280 U.S. 500 (1930). These decisions were followed

Georgia, 31 U.S. (6 Pet.) 515, 541 (1832), see Federal Indian Law 138-44, it does not make clear how the deed was in breach of them. However, we need not pursue the point since the complaint clearly does allege that the deed was executed in violation of a federal statute.

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and applied by this court in *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2 Cir. 1929).⁶

The frequently cited decision in *Taylor v. Anderson*, *supra*, written for a unanimous Court by Mr. Justice Van Devanter, who spoke with particular authority on federal jurisdiction, is directly in point. The complaint in an action in ejectment "alleged with much detail that the defendants were asserting ownership in themselves under a certain deed and that it was void under the legislation of Congress restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians." 234 U.S. at 74-75. This was held not to state a claim arising under the laws of the United States, since all that *needed* to be alleged was "that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in a sum named." *Id.* at 74.⁷ It was of no moment that the defendants might and probably would defend on the basis of the deed, which the plaintiffs would then challenge as invalid under federal legislation. Jurisdiction "must be determined from what *necessarily* ap-

6 Recognizing that all the cited cases were decided before adoption of the Federal Rules of Civil Procedure in 1938, we have considered whether the binding force of these decisions could have been affected by the Rules, more particularly by Rule 8(a) with respect to the complaint. We do not see how this result could ensue. The objective of Rule 8(a) was to make complaints simpler, rather than more expansive. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Moreover, the rule-making statute, 48 Stat. 1064 (1934), provided that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant," and Rule 82 directs that the rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." *Snyder v. Harris*, 394 U.S. 332, 337-38 (1969), is a recent and pertinent application of Rule 82.

7 Judge Port correctly held that only such allegations are needed under New York law. See *Weiss v. Goffen*, 26 Misc.2d 988, 207 N.Y.S.2d 163 (Sup. Ct. 1960).

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pears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of [sic] avoidance of defenses which it is thought the defendant may interpose." *Id.* at 75-76. (Emphasis supplied).

Plaintiffs are not aided by decisions of this court on which they heavily rely. *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (2 Cir.), *cert. denied*, 358 U.S. 841 (1958), was not an action in ejectment by Indians who were out of possession but a suit for an injunction by Indians who were in possession. In such an action, as in the case of a bill to remove a cloud on title, *Hopkins v. Walker*, 244 U.S. 486 (1917),⁸ a complete statement of plaintiff's claim to relief is appropriate. *Ivy Broadcasting Co. v. American T. & T. Co.*, 371 F.2d 486 (2 Cir. 1968), characterized in appellants' brief as "directly on point," is even further from the mark. The significant holding there was that a case could be regarded as arising under a law of the United States even though this was "federal common law" rather than a statute, a view recently affirmed by the Supreme Court, *Illinois v. City of Milwaukee*, U.S. , (1972), 40 U.S.L.W. 4439, 4442. Plaintiffs do not need to resort to that doctrine, since the 1794 statute, now 25 U.S.C. § 177, would be a law of the United States on any basis; their difficulty is that, on the rather technical view taken by the Supreme Court, their action does not "arise" thereunder.

We have considered the possibility of sustaining the complaint on a different ground, not suggested by the

8 But not in the case of a suit to quiet title, *Shulthis v. McDougal*, 225 U.S. 561 (1912). As has been well said, "It would be very surprising if this ancient lore as to the forms of action should correspond to any functional justification for federal question jurisdiction," ALI Study, *supra*, at 170.

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plaintiffs, but find this also to be precluded. Article 15 of the New York Real Property Actions and Proceedings Law provides that any person claiming an estate or interest in real property may maintain an action against any other person "to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make," § 1501. Contrary to the common law, this permits an action to remove a cloud from title to be brought by a person not in possession. See N.Y. Real Property Actions and Proceedings Law § 1515; *Burke v. Suburban Mortgage Corp.*, 43 Misc. 2d 1077, 252 N.Y.S. 2d 911 (Sup. Ct. 1964).

However, even if we were to make the unlikely assumption that the New York legislature intended this remedy to be available to Indian tribes, and could properly make it so in a case like this, see note 9 *infra*, plaintiffs can gain nothing from it. It is settled that federal courts may not apply state statutes expanding equity jurisdiction beyond that prevailing when the Constitution was adopted. This is no technical quibble but a rule deemed to be required by the Seventh Amendment's guarantee of jury trial in actions at law. *Whitehead v. Shattuck*, 138 U.S. 146 (1891), which was cited with approval and reaffirmed in *Guaranty Trust Co. v. York*, 326 U.S. 99, 105-06 (1945), is almost directly in point. An Iowa statute gave any claimant, whether in or out of possession, the right to bring an action in equity to quiet title. The Court upheld the sustaining of a demurrer to such a suit in federal court when the defendant was in possession, since the plaintiff had an adequate remedy at law in federal court. While the decision relied on § 16 of the Judiciary Act of 1789 (later Rev. Stat. § 723 and

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28 U.S.C. § 384 (1940 ed)), which limited suits in equity to cases in which there was no "plain, adequate and complete remedy" at law, and that statute was repealed in 1948 as obsolete in view of the merger of law and equity under the Federal Rules of Civil Procedure, 62 Stat. 992, the principle remains intact. Cf. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 nn.26, 27 (1949); *Potwora v. Dillon*, 366 F.2d 74, 77 (2 Cir. 1967).

Plaintiffs might argue against this that here they have no adequate remedy at law in a federal court since, for the reasons stated above, there is no federal question jurisdiction over an action in ejectment and, as will later appear, we find no other sustainable ground of federal jurisdiction. But such an argument would be largely answered by *DiGiovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 62, 69-70 (1935). See also *Matthews v. Rodgers*, 284 U.S. 521, 525-26 (1932); *Atlas Life Ins. Co. v. Southern*, 306 U.S. 563, 568-70 (1939). *DiGiovanni* was a suit in equity in the District Court for Missouri by a New Jersey fire insurance company against citizens of Missouri to cancel two fire insurance policies, one for \$3,000 and another for \$1,500, as obtained by fraud. The Court held that the action must be dismissed because of the existence of an adequate remedy at law, namely, the defense of actions on the two policies. Although "the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law," 296 U.S. at 69, plaintiff did not demonstrate inadequacy by showing that the jurisdictional amount, then \$3,000, would prevent suits on the policies from being maintained in or removed to a federal court. "The statute [28 U.S.C. § 384 (1940 ed.)] forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case

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in which they fail to do so." *Id.* at 70. In other words, adequacy of the legal remedy is tested by what a federal court could afford if it had jurisdiction, not by what it could do in the particular case. We do not believe this doctrine would yield even if, as seems not improbable, see note 9 *infra*, the plaintiffs are likewise without a remedy in the New York courts. While we recognize that *DiGiovanni* differs on its facts in that there the prospective defendant at law was the plaintiff in equity, we see nothing in Mr. Justice Stone's opinion that would render this distinction significant.

II.

Appellants also sought to sustain federal jurisdiction on the basis of diversity, 28 U.S.C. § 1332(a). Conceivably this could be either under § 1332(a)(1) conferring jurisdiction in actions between "citizens of different States" or under § 1332(a)(3) conferring jurisdiction in actions between "citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

The district court, finding it unnecessary to deal with plaintiffs' claim that The Oneida Tribe of Wisconsin, Inc. was a citizen of Wisconsin, focused on the status of The Oneida Indian Nation of New York. It considered that the most likely analogy was that of an unincorporated association, with the result that, under *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965), jurisdiction under § 1332(a)(1) would be defeated by the New York citizenship of many of the Nation's members. Appellants contend that the analogy is false since an Indian nation is something unique. See Federal Indian Law 341. Even if that be so, it would not avail the plaintiffs under § 1332(a)(1). In *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), Chief Justice Marshall stated the rule of com-

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plete diversity to be "that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." 7 U.S. (3 Cranch) at 267. This formulation has been followed in subsequent cases. See, e.g., *Florida Central Railroad v. Bell*, 176 U.S. 321 (1900); *Hooe v. Jamieson*, 166 U.S. 395 (1897); *New Orleans v. Winter*, 14 U.S. (1 Wheat.) 91 (1816); see also *Levering & Garriques Co. v. Morrin*, 61 F.2d 115, 121 (2 Cir. 1932), *aff'd*, 289 U.S. 103 (1933). The Oneida Nation of New York is surely not a citizen of a state different from New York, and the case under § 1332(a)(1) thus fares no better on plaintiffs' theory than on that of the district judge since the Nation's lack of citizenship in a state other than New York would equally defeat diversity jurisdiction.

Neither can plaintiffs establish diversity jurisdiction under § 1332(a)(3). Even if The Oneida Nation of Wisconsin, Inc. should be regarded as a citizen of Wisconsin for diversity purposes, the Oneida Nation of New York is not "a foreign state." This was established as long ago as *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17-18 (1831).⁹

⁹ Since there is no diversity under either § 1331(a)(1) or (a)(3), we have no need to consider whether, as held in *Hot Oil Service, Inc. v. Hall*, 366 F.2d 295 (9 Cir. 1966), on the asserted analogy of the rule relating to state "door-closing" statutes, see *Angel v. Bullington*, 330 U.S. 183 (1947); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), diversity jurisdiction would also be precluded by lack of jurisdiction in the courts of New York, if lack there is. The prevailing rule since *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), has been that state courts may not exercise jurisdiction over Indian tribal affairs or claims arising out of or relating to their restricted tribal lands. See Federal Indian Law 363-64. The history of this restriction, the judicial modifications of it, and its current status are discussed in *Williams v. Lee*, 358 U.S. 217 (1959). *Williams* reveals that the major

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III.

For this case a sufficient answer to the claim of jurisdiction under the Civil Rights Act, 42 U.S.C. § 1983, and its jurisdictional implementations, 28 U.S.C. § 1343(3), is that, at least with respect to damage suits, a county is not a "person" within the meaning of these statutes, *Monroe v. Pape*, 365 U.S. 167 (1961). Beyond that, the claim is impossible to fathom. Apparently it is based on the fact that although § 11-a of the New York Indian Law, added by N. Y. Laws 1958, c. 400, apparently to implement 25 U.S.C. § 233, is broad enough on its face to encompass an action like this, it may not be effective because of the proviso in the latter section restricting the grant of jurisdiction to New York courts so as to exclude land claims based on transactions or events antedating September 13, 1952, see note 9 *supra*—a matter on which we take no position. Even

role, sanctioned by Art. I, § 8, cl. 3 of the Constitution, in modifying this rule designed for the protection of Indians, has been played by Congress. "[W]hen Congress has wished the States to exercise this power it has expressly granted them jurisdiction which *Worcester v. Georgia* had denied." 358 U.S. at 221.

In that connection the Court referred to 25 U.S.C. § 233, adopted in 1950, 64 Stat. 845, which, with certain qualifications, gave the New York courts jurisdiction "in civil actions and proceedings between Indians or between one or more Indians and any other person or persons," subject, however, to a proviso that the grant should not extend to "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." Appellants point to a statement of the proposer of this proviso on the floor of the House of Representatives, 96 Cong. Rec. 12460 (1950), that in addition to the access to state courts granted by the bill, the Indians "may go into the federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have no objection to such provision." But the bill in fact made no "such provision," and the statement is altogether too tenuous a basis to confer federal jurisdiction not granted by the detailed provisions of Chapter 85 of Title 28.

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if the Oneidas' fears should be realized, we fail to understand how a state could be thought to have violated the Constitution in going only so far as federal law permits.

The judgment dismissing the complaint for want of federal jurisdiction is affirmed.¹⁰

LUMBARD, *Circuit Judge* (dissenting):

I dissent.

The district court had jurisdiction to hear the claims of the Oneida Indians which are based on 1784, 1789 and 1794 treaties between the United States and the Oneidas and five other tribes, known as the Six Nations.

Jurisdiction was conferred by 28 U.S.C. § 1362, enacted in 1966, which provides:

§ 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. Added Pub. L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.

The claims here are based on the allegations that the lands in question, occupied by the Counties of Oneida and Madison, were acquired by the State of New York in 1795 by a so-called "treaty" in violation of the provisions of the 1784, 1789 and 1794 treaties. The demand for relief is

¹⁰ We are advised that the Oneidas have filed a claim relating to the transaction here at issue with the Indian Claims Commission, 25 U.S.C. § 70a, and have received an award, but that the United States has appealed this to the Court of Claims.

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that the Oneidas be recognized as owners of the lands and that they be paid for the use of the lands. As these claims rest on treaties between the Oneidas and the United States, the Oneidas have a right to have them determined in a federal court. The legislative history of the 1966 amendment shows that it was the purpose of the Congress to make sure that the Indian tribes did have a forum to which they could go themselves when government departments and agencies declined to represent them. U.S. Code and Administrative News 1966, Vol. 2, pp. 3145-49. This view is supported by what we held and said in *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (2 Cir.), cert. denied 358 U.S. 841 (1958). I am not persuaded that any federal or state court decision or any state statute can defeat the plain meaning of § 1362 or diminish the stature of our agreements with the Six Nations to make them anything less than treaties of the United States.

The "well-pleaded complaint" rule by which the majority declares this action beyond the cognizance of the federal courts is not necessarily applicable here. The "arising under" language of the Constitution, § 1331, and § 1362 is virtually identical, yet the grant of jurisdiction under § 1331 has long been considered less generous than the Constitutional grant. Compare *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824), with *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) and *Louisville v. Nashville R.R. Co. v. Mottley*, 219 U.S. 467 (1911); see Wright, *Federal Courts*, 54-60. I would hold that the "arising under" language of § 1362 merits the broader interpretation and, consequently, that we should disregard the inhibitory effect of the "well-pleaded complaint" rule, at least until the Supreme Court has passed on the question.

Moreover, the federal interest in seeing that the rights of Indian tribes are heard and adjudicated is so great that they should be controlled by federal common law. Thus

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the claims should be considered to arise under the laws, as well as under treaties, of the United States. *Ivy Broadcasting Co. v. American Tel. & Tel.*, 391 F.2d 486 (2 Cir. 1968). Whatever merit these claims may have, it seems unthinkable to me that there should be no judicial forum in which they can be brought, be heard and be determined.

For these reasons I would reverse the order of the district court.

Appendix B — Denial of Motion for Rehearing.

72-1029

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

THE ONEIDA INDIAN NATION OF NEW YORK STATE,
also known as the ONEIDA NATION OF NEW YORK,
also known as the ONEIDA INDIANS OF NEW YORK,
and THE ONEIDA INDIAN NATION OF WISCONSIN,
also known as the ONEIDA TRIBE OF INDIANS OF
WISCONSIN, INC.,

Plaintiffs-Appellants,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE
COUNTY OF MADISON, NEW YORK,
Defendants-Appellees.

A petition for a rehearing having been filed herein by
counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

DENIED.

September 11, 1972

s/ HENRY J. FRIENDLY, C.J. per WHM
Henry J. Friendly
Chief Judge

s/ WILLIAM H. MULLIGAN
William H. Mulligan, C.J.

I dissent and vote to grant the petition.

s/ J. EDWARD LUMBARD, per WHM
J. Edward Lumbard, C.J.

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(SAME TITLE).

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EDMUND PORT, Judge

Memorandum-Decision and Order

This case is before the court on motions made by the defendants for summary judgment dismissing the plaintiffs' complaint. [139]

Approximately ten different grounds are asserted. Since I have concluded that the complaint must be dismissed for lack of subject matter jurisdiction, it will not be necessary to consider the other grounds urged by the defendants for dismissal.

A brief statement of the procedural posture of the case will help bring the jurisdictional problem it presents into focus. The complaint was amended on two occasions: the first amendment, as of right,¹ added a second cause

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of action. The second amendment resulted from the granting of plaintiffs' cross motion to amend and enlarge the jurisdictional allegations. The plaintiffs' original complaint based jurisdiction solely upon diversity of citizenship. Upon argument of defendants' motion for summary judgment dismissing the complaint, the plaintiffs were granted leave to amend the jurisdictional allegations of the complaint to read as follows:

"2. The matter in controversy exceeds, exclusive of interests[sic] and costs, the sum of \$10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA, pursuant to 28 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

THE FACTS

The plaintiffs allege that in 1795, by a treaty negotiated

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between representatives of the plaintiffs and of the State of New York, 100,000 acres of land within the defendant counties, owned by the plaintiffs from time immemorial, was deeded to the State of New York. Plaintiffs allege that they were induced to sell the land by reason of fraud practiced on them by the State of New York. They further allege that the conveyance to the State of New York was violative of earlier treaty obligations of the United States and of the Indian Nonintercourse Act of 1790.²

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The crux of plaintiffs' complaint is embodied in paragraph 22 of the first amended complaint, which reads as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements,³ By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000.00, exclusive of costs and interest.

No purpose would be served trying to tack a name on the cause of action asserted, since, except for the question of civil rights jurisdiction, the jurisdictional issues will be decided independently of the name given to the claim alleged.

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JURISDICTIONAL BASESDIVERSITY OF CITIZENSHIP

Since there is no disputing the New York citizenship of the defendant counties,⁴ the plaintiffs, in order to preserve the required complete diversity,⁵ contend that plaintiff Oneida Indian Nation of New York State (Oneida Indians of New York) is not a citizen of New York State within the meaning of 28 U.S.C. §1332.⁶

In support of this claim, they analogize the Oneida Indians of New York, an unincorporated Indian tribe, to an unincorporated labor union, which they contend under the

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holding of United Steelworkers of America, AFL-CIO v. R. H. Bouligny, Inc.,⁷ is not a "citizen" for diversity purposes. Plaintiffs' reading of this case is myopic. While an unincorporated association is not a citizen, per se, in the same sense as a corporation, the question considered and answered by the Court in the negative was "whether an unincorporated labor union is to be considered as a citizen for purposes of federal diversity jurisdiction, without regard to the citizenship of its members."⁸

Using the standard of the citizenship of its members to determine the citizenship of the tribe results in New York citizenship for diversity purposes. The individual members of the Oneida Indians of New York are citizens of the United States⁹ domiciled in New York and are consequently citizens of New York State for diversity purposes.¹⁰

Recognizing that "diversity is broken"¹¹ if the analogy

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to an unincorporated labor union is carried to its logical conclusion because "some of the members of the Tribe are residents of New York * * *,"¹² plaintiffs carry the analogy only to that point at which the unincorporated association per se has no citizenship. They distinguish the Indian tribe from other unincorporated associations because the Indian tribe "has an independent sovereignty of its own"¹³ and "is a nation within a nation"¹⁴ with whom "[t]he United States for almost a century made formal treaties * * *."¹⁵ This argument loses sight of the fact that for the last century, recognition has been denied to any Indian nation or tribe "as an independent nation, tribe, or power with whom the United States may contract by treaty."¹⁶

The plaintiff has not specifically asserted jurisdiction under 28 U.S.C. §1332(a)(2) or (a)(3).¹⁷ However, even if its independent nation theory were urged as a ground for

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asserting jurisdiction under these subdivisions, the argument would fail. Even before the Act of March 3, 1871, the Supreme Court had held that Indian nations or tribes are not foreign nations for federal jurisdictional purposes.¹⁸

FEDERAL QUESTION JURISDICTION

Federal question jurisdiction will be considered under 28 U.S.C. §§1331¹⁹ and 1362.²⁰ No question has been raised as to the qualifications of the plaintiffs as Indian tribes "with a governing body duly recognized by the Secretary of the Interior * * *."²¹ Nor is there any question that the amount in controversy exceeds \$10,000.00. This leaves as the only open question whether [143]

"the matter in controversy arises under the Constitution, laws or treaties of the United States."²²

Determining whether a complaint states a claim "arising under" the Constitution, treaties, or laws of the United States is usually not an easy undertaking. Despite the problems of construction posed by "arising under," the Court of Appeals for this circuit has distilled from a long line of cases criteria for "testing the complaint for sufficient assertion of a federal question * * *."²³

Whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred" from federal law, or whether a properly pleaded "state-created" claim itself presents a "pivotal question of federal law," for example because of an act of Congress must be construed or "federal common law govern[s] some disputed aspect" of the claim.²⁴

In addition to this test, a number of general principles have become well established. The federal question must appear on the face of a well-pleaded complaint.²⁵ It is not enough that the allegations show the likelihood of a

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question arising under federal law at some later juncture in the lawsuit.²⁶ Similarly, a case does not "arise under" federal law if the complaint merely anticipates a defense which involves federal law.²⁷ Nor does a suit "arise under" a law renouncing a defense * * *."²⁸ A case "arises under" federal law when the well-pleaded complaint "discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of a law of Congress."²⁹

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Shorn of all non-essential allegations, the complaint in this case is seeking damages for defendants' use and occupancy of land. This cause of action, regardless of the label it is given, is created under state law and requires only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. None of these essential allegations calls into question the Constitution, treaties, or federal law.³⁰ The local property rights of numerous land owners within Madison and Oneida Counties, it seems to me, should be decided by the application of state law.³¹

Unlike a suit to remove a cloud on a title, the complaint in the present type of action need not allege the existence and invalidity of the instrument under which the defendant claims title.³² It may well be that 25 U.S.C. §177 or the Treaty of 1795 could be called into question during the course of litigation, but such introduction would serve only to renounce a defense that title or right of possession to the land in question vested in New York State. The possible necessity of interpreting §177 or the Treaty in connection with a potential defense is insufficient to sustain federal question jurisdiction.³³

Clearly, §177 does not create the remedy sought to be enforced in this lawsuit. The sole remedy of that section is a penalty provision in favor of the United States. Nor is this a case where the remedy sought may be inferred

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from federal law.³⁴ The complaint, stripped of all surplusage, does not present a "pivotal question of federal law."

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The complaint must also fail for failing to allege facts which give this court jurisdiction under the remaining part of the McFaddin test. While Title 25 of the United States Code, as well as other laws, the Constitution and treaties, evidences a concern for the protection of Indians,³⁵ there is little evidence that Congressional policy demands that this type of action be heard in a United States District Court. The action here calls for a state remedy granted, if at all, under state law, not under federal common law.

CIVIL RIGHTS JURISDICTION

That jurisdiction does not lie under 28 U.S.C. §1343 and 42 U.S.C. §1983 requires little discussion. No matter how the plaintiffs attempt to dress it up, the complaint alleges "an action addressed solely to the taking of property"³⁶ which does not support jurisdiction under the quoted sections.³⁷ And if by some stretch of the imagination plaintiffs were to get over this hurdle, the fact that the Civil Rights Act does not apply to suits against municipalities would present an insurmountable barrier.³⁸

For the reasons herein, it is

ORDERED, that the defendants' motion to dismiss the complaint be and the same hereby is granted for lack of subject matter jurisdiction.

s/ EDMUND PORT
United States District Judge

Dated: November 9, 1971
Auburn, New York

FOOTNOTES

- 1 Fed. R. Civ. P. 15(a).
- 2 1 Stat. 137, now 25 U.S.C. §177 (1964).
- 3 Since the treaty of 1795 dealt with 100,000 acres within the Counties of Oneida and Madison, and since the claim against the defendants relates only to "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements," it is obvious that there are, of necessity, numerous other parties, occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom like claims could be made.
- 4 Cowles v. Mercer County, 74 U.S. 118 (1868); Brown v. Marshall County, Kentucky, 394 F.2d 498 (6th Cir. 1968).
- 5 Strawbridge v. Curtiss, 7 U.S. 159 (1806).
- 6 28 U.S.C. §1332 (1964). This section reads, in pertinent part, as follows:
- (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between--
- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
- 7 382 U. S. 145 (1965).
- 8 Id. at 147 (emphasis added).

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⁹ 8 U.S.C. §1401 (1964). See also U.S. Const., amend XIV, §1.

¹⁰ See U.S. Const., amend XIV, §1; Pemberton v. Colonna, 290 F.2d 220 (3rd Cir. 1961). See also Matter of Heff, 197 U.S. 488 (1905); Meeks v. McAdams, 390 F.2d 650 (10th Cir. 1968); Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), cert denied 382 U.S. 986 (1966).

¹¹ Plaintiffs' Brief on Issue of Jurisdiction, dated Dec. 18, 1970 at p. 6.

¹² Id.

¹³ Id.

¹⁴ Id.

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¹⁵ Id.

¹⁶ 25 U.S.C. §71 (1964), derived from Act of Mar. 3, 1871, C. 120, §1, 16 Stat. 566.

¹⁷ 28 U.S.C. §§1332(a)(2), (a)(3) (1964). These subsections are set forth in note 6, supra.

¹⁸ Cherokee Nation v. State of Georgia, 30 U.S. 1 (1831).

¹⁹ 28 U.S.C. §1331 (1964). This section, in pertinent part, reads as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

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²⁰ 28 U.S.C. §1362(added Pub. L. 89-635, §1, Oct. 10, 1966, 80 Stat. 880). This section provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

²¹ Id.

²² Id.; 28 U.S.C. §1331 (1964).

²³ McFaddin Express, Incorporated v. Adley Corporation, 346 F.2d 424, 425 (1965), cert. denied 328 U.S. 1026 (1966).

²⁴ Id. at 426. See also Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2d Cir. 1968); T.B. Harms Company v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied 381 U.S. 915 (1965).

²⁵ Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894).

²⁶ Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908).

²⁷ Id.; Hopkins v. Walker, 244 U.S. 486 (1917).

²⁸ Gully v. First Nat. Bank, 299 U.S. 108, 116 (1936).

²⁹ Hopkins v. Walker, supra at 489.

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³⁰ See Taylor v. Anderson, 234 U.S. 74 (1914); Deere v. St. Lawrence River Power Co., 32 F.2d 550 (2d Cir. 1929).

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31 See note 3, supra.

32 Compare Hopkins v. Walker, supra.

33 See Gully v. First Nat. Bank, Supra.

34 See Wheeldin v. Wheeler, 373 U.S. 647 (1963).

35 Insofar as the plaintiffs may be entitled to redress against the United States, a claim is not pending before the Indian Claims Commission. See Exhibit, attached to Plaintiffs' Reply Brief on Issue of Jurisdiction; Defendant County of Oneida's Supplemental Brief, p. 5.

36 Eisen v. Eastman, 421 F.2d 560, 564 (2d Cir. 1969), cert. denied 400 U.S. 841 (1970).

37 Id.

38 Monroe v. Pape, 365 U.S. 167 (1961). See also United States ex rel. Gittlemacker v. County of Philadelphia, 413 F.2d 84 (3rd Cir. 1969), cert. denied 396 U.S. 1046 (1970).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

[1]

THE ONEIDA INDIAN NATION OF NEW YORK STATE,
also known as the ONEIDA NATION OF NEW YORK,
also known as the ONEIDA INDIANS OF NEW YORK,
and THE ONEIDA INDIAN NATION OF WISCONSIN,
also known as the ONEIDA TRIBE OF INDIANS OF
WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE
COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs, for their complaint against defendants, allege
and show that:

1. Plaintiff, THE ONEIDA INDIAN NATION OF NEW YORK STATE, is an Indian Nation or Tribe with its principal Reservation and situs in the Counties of Oneida and Madison, State of New York. Plaintiff, THE ONEIDA INDIAN NATION OF WISCONSIN, is an incorporated Indian Nation or Tribe with its principal Reservation and situs in the State of Wisconsin. Defendants are Counties of the State of New York.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$10,000.00. Jurisdiction is conferred by diversity of citizenship.

3. From time immemorial, down to the time of the American Revolutionary War, the plaintiffs owned some 6,000,000 acres of land in New York State, as shown on the map annexed as Exhibit A. In the American Revolutionary War, the plaintiffs fought on the side of the Thirteen Colonies and rendered valuable and material support, which helped the Colonies attain victory and independence.

4. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article

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IX of the Articles of Confederation and under Article L, Section 8, of the United States Constitution. Under this power, treaties were made [2]

with the Oneidas, which read in part as follows:

Treaty with Six Nations - Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations - Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations - Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States. . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

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Treaty with Oneida, Tuscarora and Stockbridge Indians -
Oneida 1974

"Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

5. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 U.S.C.A. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

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"Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Here well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

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Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

"The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

6. Plaintiffs hereby invoke Section 177 of the Federal Law, Title 25 U.S. Code, which reads as follows:

"Section 177. Purchases or Grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claims to land within such State, which shall be extinguished by treaty. R.S. Section 2116."

7. Plaintiffs hereby invoke Section 194 of the Federal Indian Law, Title 25 U.S. Code, which reads as follows:

"Section 194. Trial of right of property; burden of proof

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In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian

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shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. Section 2126."

8. In the so-called "Treaty" at Fort Stanwix in 1788, the plaintiffs purportedly ceded most of their lands (over 5,000,000 acres) to the State of New York, their former ally, for a consideration of \$5500 plus an annuity of \$600 per year forever. Reserved from this cession was a tract of land of about 300,000 acres located in what is now denoted the Counties of Oneida and Madison. Such tract is herein called plaintiffs' "Reservation" or "the Reservation" and is described in paragraph Second of said Treaty. A copy of the 1788 treaty is annexed to and made a part of this complaint as Exhibit "B".

9. The Reservation was still intact in 1790, at the time of enactment of the "Indian Non-Intercourse Act" (1 Stat. 137 (1790), similar in intent to Section 177 of 25 U.S.C.A.), which expressly forbade and declared invalid any sale of Indian Reservations without the consent of the United States.

10. In the year 1795 representatives of New York State met with representatives of plaintiffs and concluded another "Treaty" whereby plaintiffs purportedly deeded to the State a large portion of the Reservation. Exhibit "C", annexed, is a copy of said "Treaty" and contains a description of the lands purportedly deeded to the State. It is the lands described in Exhibit C which are the subject of this action, hereinafter called the "premises".

11. All of the Indians, representatives of plaintiffs, who signed the said "Treaty" of 1795 (herein the "Treaty")

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signed with an "X" in place of a signature indicating, on information and belief, that they could not read or write.

12. At the time of making of said "Treaty" of 1795, the federal law forbidding sale of Indian lands without consent of the United States was in full force and effect, and the premises were lands subject to such law. See 1 Stat. 329 (1793). No federal

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consent, on information and belief, was ever obtained to such purported deed to the State. On information and belief, no U.S. Commissioner was present at the negotiations or the execution of such purported "Treaty". On information and belief, the U.S. has never approved or ratified such purported "Treaty", and the purported transfer is invalid under federal law.

13. On information and belief, the consideration to be paid to plaintiffs under such "Treaty" was based on a perpetual annuity of Three Dollars a year for every hundred acres (3 cents per year per acre), which computed at 6% amounts to a principal price of fifty cents per acre.

14. In the period 1792-1795, the Holland Land Company through its agent, John Lincklaen of Cazenovia, was selling nearby land (just south of the premises) at from \$1.50 to \$4.00 per acre unimproved. From 1795 to the early 1800's, nearby land was sold to settlers at \$4.00, \$5.00 and \$6.00 per acre.

15. The lands (the premises) purchased for \$0.50 per acre from plaintiffs in 1795 were sold off in 1797 to settlers and developers for a consideration fixed by state law at \$3.53-1/2 per acre. This represented a profit to the state of \$3.03-1/2 per acre on the premises, a 500% profit in two years.

16. On information and belief, the representatives of New York State misrepresented to plaintiffs the value of

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their land and induced them to sell it for an unconscionable and inadequate price.

17. New York State also knew and admitted that federal law forbade such land acquisitions, since it recognized the need for U.S. consent in connection with a further land purchase from plaintiffs in 1798 and in connection with four other acquisitions of Indian lands from 1797-1802.

18. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded became the property of the Counties

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of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of said occupancy plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least \$10,000, exclusive of costs and interest.

19. By bringing this action, plaintiffs do not waive or relinquish any right or action in respect of its lands in New York State as shown on Exhibit A.

20. Both the federal and state treaties provide that the Oneida Indians are to ask the help of the United States and the State before taking any action on their own. The plaintiffs have asked the help of both the federal and state governments and such help has been refused.

21. It has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors. The plaintiffs bring this action against defendants only because all other avenues of redress have been closed to them.

Wherefore, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS

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(\$10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

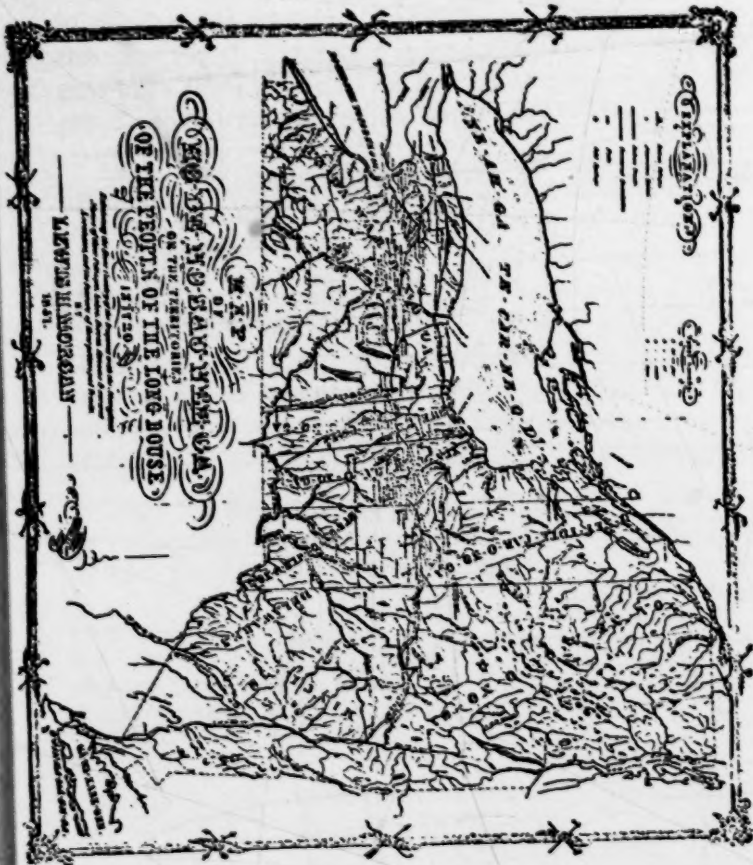
By _____

**Attorneys for Plaintiffs
Office and P. O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121**

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Exhibit A — Map annexed.

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// STATE TREATY WITH THE ONEIDA INDIANS, 1788.

At a treaty held at Fort Schuyler, formerly called Fort Stanwix, in the State of New York, by his Excellency George Clinton, Governor of the said State, and William Floyd, Ezra L'Hommiedieu, Richard Varick, Samuel Jones, Egbert Benson and Peter Gansevoort, Junr. (Commissioners authorized for that purpose by and on behalf of the People of the State of New York) with the Tribe or Nation of Indians called the Oneidas — it is on the twenty-second day of September, in the year one thousand seven hundred and eighty-eight, covenanted and concluded as follows:

First, The Oneidas do cede and grant all their lands to the people of the State of New York forever.

Secondly. Of the said ceded lands the following tract, to wit: Beginning at the Wood Creek opposite to the mouth of the Canada Creek, and where the line of property comes to the said Wood Creek, and runs thence southerly to the north-west corner of the tract to be granted to John Francis Perache, thence along the westerly bounds of the said tract to the south-west corner thereof, thence to the north-west corner of a tract granted to James Dean; thence along the westerly bounds thereof to the south-west corner of the last mentioned tract; thence due south until it intersects a due west line from the head of the Tiannaderha or Unadilla River; thence from the said point of intercession due west until the Deep Spring bears due North; thence due North to the Deep Spring, thence the nearest course to the Caneserage Creek, and thence along the said Creek the Oneida Lake and the Wood Creek to the place of beginning, shall be reserved for the following several uses. That is to say, the lands lying to the northward on a line parallel to the southern line of the said reserved lands, and four miles distant from the said Southern line, the Oneidas shall hold to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any other manner aliened or disposed of to others. The Oneidas may from time to time forever make leases of the lands between the said parallel line (being the residue of the said reserved lands) to such persons and on such rents reserved as they shall deem proper; but no lease shall for a longer term than twenty-one years from the making thereof; and no new lease shall be made until the former lease of the same lands shall have expired. The rents shall be to the use of the Oneidas and their posterity forever; and the people of the State of New York shall from time to time make provision by law to compel the lessees to pay the rents, and in every other respect to enable the Oneidas and their posterity to have the full benefit of their rights so to make leases and to prevent

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[ASSEMBLY,

frauds on them respecting the same; and the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same, and especially there shall forever remain ungranted by the people of the State of New York one half mile square at the distance of every six miles of the lands along the northern banks of the Oneida Lake, one half mile in breadth of the lands on each side of the Fish Creek, and a convenient piece of land at the fishing place in the Onondaga River about three miles from where it issues out of the Oneida Lake, and to remain as well for the Oneidas and their posterity as for the inhabitants of the said State to land and encamp on. But notwithstanding any reservation to the Oneidas, the people of the State of New York may erect public works and edifices as they shall think proper at such place and places at or near the confluence of the Wood Creek and the Oneida Lake as they shall elect and may take and appropriate for such works or buildings lands to the extent of one square mile at each place; and further notwithstanding any reservations of lands to the Oneidas for their own use, the New England Indians (now settled at Brothertown under the pastoral care of the Rev. Samson Occom) and their posterity forever, and the Stockbridge Indians and their posterity forever are to enjoy their settlements on the lands heretofore given to them by the Oneidas for that purpose, that is to say, a tract of two miles in breadth and three miles in length for the New England Indians, and a tract of six miles square for the Stockbridge Indians.

Thirdly. In consideration of the said Cession and Grant, the People of the State of New York do at this treaty pay to the Oneidas two thousand dollars in money, two thousand dollars in clothing and other goods, and one thousand dollars in provisions; and also five hundred dollars in money to be applied towards building a grist mill and saw mill at their village (the receipt of which moneys, clothing and goods and provisions the Oneidas do now acknowledge), and the People of the State of New York shall annually pay to the Oneidas and their posterity forever on the first day of June in every year at Fort Schuyler aforesaid six hundred dollars in silver; but if the Oneidas or their posterity shall at any time hereafter elect that the whole or any part of the said six hundred dollars shall be paid in clothing or provisions, and give six weeks previous notice thereof to the Governor of the said State for the time being, then so much of the annual payment shall for that time be in clothing or provisions as the Oneidas and their posterity shall elect, and at the price which the same shall cost the people of the State of New York at Fort Schuyler aforesaid; and as a

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Exhibit C — Treaty of 1795 annexed.

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further consideration to the Oneidas the people of the State of New York shall grant to the said John Francis Perache a tract of land, Beginning in the line of property at a certain cedar tree near the road leading to Oneida and runs from the said cedar tree southerly along the line of property two miles; thence westerly at right angles to the said line of property two miles; thence northerly at right angles to the last course two miles, and thence to the place of beginning; which the said John Francis Perache hath consented to accept from the Oneidas in satisfaction for an injury done to him by one of their Nation. And further, the lands intended by the Oneidas for John T. Kirkland and for George W. Kirkland, being now appropriated to the use of the Oneidas, the people of the State of New York shall therefore, by a grant of other lands make compensation to the said John T. Kirkland and George W. Kirkland. And further, that the people of the State of New York shall as a benevolence from the Oneidas to Peter Penet and in return for services rendered by him to their Nation, grant to the said Peter Penet of the said ceded lands lying to the northward of the Oneida Lake a tract of ten miles square; wherever he shall elect the same.

Fourthly. The people of the State of New York may in such manner as they shall deem proper, prevent any persons except the Oneidas, from residing or settling on the lands so to be held by the Oneidas and their posterity for their use and cultivation, and if any person shall without the consent of the People of the State of New York come to reside or settle on the said lands or any other of the lands so ceded as aforesaid, except the lands whereof the Oneidas may make leases as aforesaid, the Oneidas and their posterity shall forthwith give notice of such intrusions to the Governor of the said State for the time being. And further, the Oneidas and their posterity forever shall at the request of the Governor of the said State be aiding to the people of the State of New York in removing all such intruders, and in apprehending not only such intruders but also felons, and other offenders who may happen to be on the said ceded lands, to the end that such intruders, felons and other offenders may be brought to justice.

In testimony thereof as well the sachems, chiefs, warriors and others of the said Oneidas in behalf of their tribe or Nation, as the said Governor and other commissioners of the People of the State of New York, have hereunto interchangeably set their hands and affixed their seals the day and year first above written.

ODAGHSEGHTÉ
KANAGHGWEYA

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[ASSEMBLY,

PETER OTSIQUETTE
THAGHNIYONGO
THONIGWEAGHSHALE
TEHEAND YAKHON
OGISTALALE *alias* HANYURRY
OTSETOGON
TEYOHAGWEANDA
ONEYANHA *alias* BEECH TREE
THAGHNEGHTOLIS *alias* HENDRICK
S' HONOUGHLEYO *alias* ANTGONY
THAGTAGHGUISEA
HANAGHSALILGH
GAGHSAWEDA
TYAGHSWEANGALOLIS *alias* DOMINE PETER
JOHEGHSLISHEA *alias* DANIEL
THANIGEANDAGAYON
ALAWISTONIS *alias* BLACKSMITH
KEANYAKO *alias* DAVID
KAKIKTOTON
SAGOYONTHA
HANNAH SODOLK
TEHOUGHNIHALK HANWAGALET
KASKONGHGWEA KANWAGALET
HONONWAYELE
SKENONDONGH
GEORGE CLINTON
WM FLOYD
EZRA L'HOMMEDIEU
RICHARD VARICK
SAMUEL JONES
EGBERT BENSON
PETER GANSEVOORT, *Jura.*

(The Indians all signed this instrument by making their mark, a cross, at the end of their names, which had been written for them.)
Witnesses present.

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The words (and the Stockbridge indians and their posterity forever) after the third word in the last line of the second article, and also the words (for the New England Indians and a tract of six miles square for the Stockbridge Indians) at the end of the same line and also the words (two thousand dollars in money) in the first line of the third article, and the words (except the lands whereof the Oneidas may make leases as aforesaid) in the third line of the fourth article being first interlined.

Before the execution hereof the Oneidas in Public Council declared to the Commissioners that they had in return for his frequent good offices to them given to John I. Bleecker of the lands reserved for their own use, one mile Square adjoining to the lands of James Dean and requested that the same might be granted and confirmed to him by the State.

SAML. KIRKLAND,

Miss'y & Interpreter.

J. B. CHRIS. DEST,

Trys.

ABM. ROSEKRANTZ,

SIMEON DEWITT,

Surv. Genl.,

SAMUEL LATHAM NITHCCELL,

JOHN TAYLER,

WM. COLBRATH //

Know all Men by these presents that We the Sachems Warriors and Women of the Oneida Nation of Indians in full Council assembled Have nominated constituted and appointed and by these presents Do nominate constitute and appoint Our Brothers of the said nation Peter Hannoughgwinya John Shawondo, Martinus Atshinha, Paul Otsbetogon of the Wolf Clan, Anthony Shononghriyo William Taghtaghvijiye John Onontio Thomas Tehohearitba of the Turtle Clan and Joseph Ogeaghbratarighahea Nicholas Sagovakarongo Nicholas Tehotsakaron and Kamyoton of the Bear Clan Our lawful deputies and attorneys for us and in Our name and in our behalf to treat with the Commissioners appointed by an act of the Legislature of the State of New York entitled "an act for the better support of the Oneida Onondago and Cayuga Indians and other purposes therein mentioned" and to bargain sell release and confirm unto the People of the said State all our right title interest Claim and demand whatsoever of in and to such part or parts of the lands within said State

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Exhibit C — Treaty of 1795 annexed.

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[ASSEMBLY,

// This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread, Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attorneys authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part :

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner

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thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two

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[ASSEMBLY;

Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to

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convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained in the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith of part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

JOHN ^{his}
X ^{mark} SKANONDO [L. a.]

WILLIAM ^{his}
X ^{mark} TAGHTAGHGIVESIRE [L. a.]

ANTHONY ^{his}
X ^{mark} SHONONGHIYO [L. a.]

JACOB REED [L. a.]

MARTINUS ^{his}
X ^{mark} ALSHINSHA [L. a.]

PETER ^{his}
X ^{mark} BREAD [L. a.]

JACOB ^{his}
X ^{mark} DOXTADER [L. a.]

THOMAS ^{his}
X ^{mark} TEHOHEARIETHA [L. a.]

CHRISTIAN ^{his}
X ^{mark} KANYARODON [L. a.]

JOHN ^{his}
X ^{mark} DENNY [L. a.]

JOSEPH ^{his}
X ^{mark} HOT ASHES [L. a.]

THANJOTON ^{his}
X ^{mark} [L. a.]

NICHOLAS X JEHOTSKARIAON [L. a.]

MOSES ^{his}
X ^{mark} CHAHAGIGHTE [L. a.]

PETER ^{his}
X ^{mark} TEKAWIGATIGHRON [L. a.]

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[ASSEMBLY,

EZEKIEL	^{his} x mark	SHAWSTAGOWA	[L. a.]
JOHN JOURDAN			[L. a.]
ELEAZAR	^{his} x mark	SHANEWIS	[L. a.]
PAUL	^{his} x mark	TEHONEVATASE	[L. a.]
ABRAHAM	^{his} x mark	ONEGERENGHT	[L. a.]
PH. SCHUYLER			[L. a.]
JOHN CANTINE			[L. a.]
D. BROOKS			[L. a.]

Sealed and delivered in the presence of
NOR. The words "four miles distant
from the Eastern Boundary of the
Tract so appropriated as aforesaid,
thence Northerly by strait lines par-
allel to the Eastern boundary "lines
of the Lands so appropriated and
and keeping four miles distant there-
from until it reaches a place," were
interlined before Execution—inter-
lined between the twelfth & thir-
teenth Lines, between the words
Point and four—the words appro-
priated throughout the whole of the
above Instrument written on Erasures
before the Execution thereof.

EPH^m VAN VEORTEN,
JAMES DEAN.

STATE OF NEW YORK

Be it remembered that on the Sixteenth day of September One
thousand seven hundred and ninety five personally appeared before
me Egbert Benson Esquire one of the Judges of the Supreme Court
of the said State James Deana one of the within subscribing
Witnesses who being duly sworn did depose that he saw Philip
Schuyler, John Cantine and David Brooks the agents therein named
and the twenty Indians whose names are thereto subscribed seal &

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deliver the within Indenture, and that he the deponent subscribed his name as a Witness thereto, and saw Ephraim Van Vechten the other Witness also subscribe his name thereto, and I having Inspected the same and not finding any erasures or Interlineations therein other than those noted to have been made before Execution do allow it to be Recorded.

EGBT BENSON—

The preceding Instrument is a true Copy of the Original words first above written last line page 177 and words "Ph: Schuyler (L S) John" 10/A line page 178 written on Erasures and word said at 11/A line page 174 interlined Compared therewith this 28th day of March 1796 By Me

LEWIS A. SCOTT,

Secretary //

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Houmedieu and John Tayler Agents for the State of New York.....

The said Indians having in the month of March last Proposed to the Governor of the said State to cede the Lands herein after described, for the compensation herein after mentioned—and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and South-westward of a Line from the Northeastern corner of Lot No. 51 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side F.P. S. 1798. and on the South side with three Notches and a blazo standing on the bank of the Oneida Lake in the Southern part of a Bay called Nowagghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation—And also the same

{Assembly, No. 51.]

Appendix D-1 — Amendment to Complaint.

[22]

(SAME TITLE).

Plaintiffs hereby amend their complaint in the above-entitled action and allege and show as and for an alternate, separate, and distinct cause of action a new paragraph, "22", as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000.00, exclusive of costs and interest.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS (\$10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By s/ GEORGE C. SHATTUCK

Attorneys for Plaintiffs
Office and P.O. Address
1000 State Tower Building
Syracuse, New York 13202
Telephone (315) 422-0121

Appendix D-2 — Second Amendment to Complaint.

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(SAME TITLE).

This cause coming on to be heard upon the plaintiffs' motion for leave to file an amendment to their complaint herein and for an order that this cause be heard upon the plaintiffs' complaint as thus amended, and it appearing that justice requires that their motion be granted, and this Court being fully advised,

IT IS ORDERED, that the complaint herein be amended so that paragraph 2 thereof shall read as follows:

"2. The matter in controversy exceeds, exclusive of interests and costs, the sum of \$10,000. Jurisdiction is conferred by diversity of citizenship and because this complaint presents a federal question involving the Constitution, Article I, Section 8, Clause 3, the Treaties, and the Laws of the United States, and plaintiffs claim relief under such Constitution, Treaties, and Laws. Jurisdiction is also claimed under Sections 1983 and 1984 of 42 USCA 1343, because plaintiffs have been and are being deprived of property without due process of law and without equal protection of the law, in violation of their rights under the Constitution of the United States."

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and it is further

ORDERED, that defendants' motion to dismiss the complaint be deemed made against the complaint as so amended.

Dated, December 2, 1970

s/ EDMUND PORT
United States District Judge

SU

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SUPREME COURT, U. S. **72-851**

No.

Supreme Court, U. S.
FILED

DEC 27 1972

MICHAEL BODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, Inc.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THE COUNTY OF ONEIDA, NEW YORK.

RAYMOND M. DURR,

Attorney for Respondent, The County of Oneida, New York,

800 Park Avenue,

Utica, N. Y. 13501

315 798-5910.



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IN THE
Supreme Court of the United States

October Term, 1972

No.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

Petitioners.

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT, THE COUNTY OF ONEIDA.

Questions Presented.

I. Does the "well-pleaded complaint" rule apply to the "arising under" language of 28 U. S. C. §1362?

II. Does an action which is basically a State action in ejectment present a Federal question albeit plaintiffs'

claim of right or title is founded on a Federal statute, patent or treaty?

Reasons for Denying the Writ.

I.

The jurisdictional issue in this case is the same under 28 U. S. C. §1331 and 28 U. S. C. §1362. Judge Friendly noted in the Court of Appeals Decision that:

"Apart from the use of the same language as in §1331, the legislative history makes clear that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. See 1966 U. S. Code Cong. & Adm. News 3145-49. The decision, *Foder v. Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.*, 339 F. 2d 360 (9 Cir. 1964), which the statute aimed to overrule, involved a claim that would have been assertable under §1331 but for the requirement of jurisdictional amount."

Taylor v. Anderson, 234 U. S. 74 (1914), is directly in point. The defendants in that case asserted ownership in themselves under a certain deed that was void under the legislation of Congress restricting alienation of lands allotted to the Choctaw and Chickasaw Indians. 234 U. S. at 74-75. This was held not to state a claim arising under the laws of the United States, since all that needed to be alleged was "that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in the sum named." *Id.* at 74. The court noted that jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own

claim in the bill or declaration, unaided by anything alleged in anticipation of (*sic*) avoidance of defenses which it is thought the defendant may interpose." *Id.* at 75-76.

If, then, the nature of petitioners' claim is such that relief is denied them in State Courts (25 U. S. C. 233 adopted in 1950, 64 Stat. 845); *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515 (1832), and in Federal Courts (*Taylor v. Anderson, supra*), we respectfully suggest that petitioners look at Congress for relief rather than to the courts. Whatever rights are denied petitioners have been denied them by Congress and not by the courts. "When Congress has wished the States to exercise this power it has expressly granted them jurisdiction which *Worcester v. Georgia* had denied." 358 U. S. at 221.

In the opinion of the court below, Judge Friendly correctly points out:

"Apparently it is based on the fact that although §11-a of the New York Indian Law, added by N. Y. Laws 1958, c. 400, apparently to implement 25 U. S. C. §233, is broad enough on its face to encompass an action like this, it may not be effective because of the proviso in the latter section restricting the grant of jurisdiction to New York courts so as to exclude land claims based on transactions or events antedating September 13, 1952. * * *—a matter on which we take no position. Even if the Oneidas' fears should be realized, we fail to understand how a state could be thought to have violated the Constitution in going only so far as federal law permits."

CONCLUSION.

Petitioners' writ of certiorari should be denied.

**RAYMOND M. DURR,
Attorney for Respondent, The
County of Oneida, New York,
800 Park Avenue,
Utica, N. Y. 13501
Tel: (315) 798-5910.**

Supreme Court, U. S.
FILED

JAN 8 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

72-851

THE ONEIDA INDIAN NATION OF NEW YORK
STATE, also known as the ONEIDA NATION OF NEW
YORK, also known as the ONEIDA INDIANS OF NEW
YORK, and the ONEIDA INDIAN NATION OF WIS-
CONSIN, also known as the ONEIDA TRIBE OF INDIANS
OF WISCONSIN, Inc.,

Appellants,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE
COUNTY OF MADISON, NEW YORK,

Appellees.

BRIEF FOR APPELLEE, COUNTY OF MADISON.

WILLIAM L. BURKE,

*Attorney for Appellee, County of
Madison,*

29 Lebanon Street,
Hamilton, N. Y. 13346



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IN THE

District Court of the United States

October Term, 1972.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

Appellants,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Appellees.

BRIEF FOR APPELLEE, COUNTY OF MADISON.

Questions Presented.

I. Is there any federal jurisdiction, because the claim fails to comply with the "well-pleaded complaint" rule?

II. Can there be federal jurisdiction, where there is no diversity of citizenship?

III. Is a county a "person" within the meaning of the Civil Rights Act, 42 U. S. C. Section 1983 and 28 U. S. C. Section 1343 (3)?

Statutes Involved.

25 U. S. C. Section 177 (1964).

Act of 1875.

Act of 1794 (now 25 U. S. C. Section 177).

28 U. S. C. 1332 (a).

28 U. S. C. 1332 (a) (1).

28 U. S. C. Section 1332 (a) (3).

42 U. S. C. Section 1983.

28 U. S. C. Section 1343 (3).

Statement.

The appellants assert that in 1795 a treaty was negotiated between the predecessors of the appellants and the State of New York for approximately one hundred thousand acres of land owned by the appellants' predecessors since the beginning of time.

The appellants contend that they were fraudulently induced to dispose of the land, and as a result thereof the conveyance to the State of New York was in violation of treaty obligations of the United States and of the Indian Non-Interference Act of 1790, now 25 U. S. C. Section 177 (1964).

The cornerstone of the appellants' complaint is contained in paragraph designated 22 of the first amended complaint, which reads as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000, exclusive of costs and interest.

Reasons for Denying the Writ.

I

The writ of certiorari should be denied because there is no federal question jurisdiction due to the fact that the complaint does not comply with the "well-pleaded complaint" rule.

II

There is no federal jurisdiction, because there is no diversity of citizenship.

III

A county is not a "person" within the meaning of 42 U. S. C. Section 1983 and 28 U. S. C. Section 1343 (3) "Civil Rights Act."

POINT I.

There is no federal question jurisdiction, because the claim does not comply with the "well-pleaded complaint" rule.

It is well established that federal question jurisdiction will exist only if the reliance on a federal right appears on the face of a well-pleaded complaint. The first Supreme Court decision construing the Act of 1875, which created federal question jurisdiction, in which state rule was applied was *Gold-Washington & Water Co. v. Keyes*, 96 U. S. 199 (1877), and the rule has been followed ever since. The practical effect of the rule is to bar "excess to federal court on the basis of allegations which are not required by nice pleading rules," see ALI Study of the Division of Jurisdiction between State and Federal Courts, Commentary on Section 1311, pages 169-70 (1969). This is particularly referable to cases involving rights to land.

The appellants' complaint, when carefully analyzed, delineates the fact that the action is basically one of ejectment. There is a long uninterrupted succession of Supreme Court decisions holding that the complaint in such an action presents no federal question, even when the plaintiff's claim of right of title is founded on a federal statute, patent or treaty. *Florida Central Railroad v. Bell*, 176 U. S. 321 (1900); *Filhiol v. Maurice*, 185 U. S. 108 (1902); *Filhiol v. Torney*, 194 U. S. 356 (1904); *Taylor v. Anderson*, 234 U. S. 74 (1914); *White v. Sparkhill Realty Corp.*, 280 U. S. 500 (1930); *Deere v. St. Lawrence River Power Co.*, 32 F. 2d 550 (2 Cir. 1929).

The question presented by the appellants does not arise under the 1794 statute, now 25 U. S. C., Section 177.

Federal Courts may not apply State statutes expanding equity jurisdiction beyond that which prevailed when the Constitution was adopted. This rule is required by the Seventh Amendment's guarantee of jury trial in actions of law. *Whitehead v. Shattuck*, 138 U. S. 146 (1891); *Guaranty Trust Co. v. York*, 326 U. S. 99, 105-06 (1945).

The case of *DiGiovanni v. Camden Fire Ins. Ass'n*, 296 U. S. 62, 69-70 (1935), is authority for the proposition that there is no federal question jurisdiction over an action in ejectment.

POINT II.

There is no federal jurisdiction, because there is no diversity of citizenship.

The appellants could invoke 28 U. S. C. Section 1332 (a) (1) which confers jurisdiction in actions between citizens of different states, or 28 U. S. C. Section 1332 (a) (3) which confers jurisdiction in actions between citizens of different states and in which foreign states or citizens or subjects are additional parties.

The district court summarily dismissed the appellants' claim that the Oneida Tribe of Wisconsin, Inc., was a citizen of Wisconsin.

The district court drew the analogy of an unincorporated association, under *United Steelworkers of America v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965), and

stated that jurisdiction under U. S. C. Section 1332 (a) (1) would not be conferred because of the New York Citizenship of many of the Nation's members.

The appellants contend that this analogy is fallacious, since an Indian nation is unique. See Federal Indian Law 341. In the event that this were true, it would not aid the appellants under 28 U. S. C. Section 1332 (a) (1). In the case of *Strawbridge v. Curtiss*, 7 U. S. (3 Cranch) 267 (1806), the rule stated that in order to have complete diversity, each distinct interest should be represented by persons, all of whom might be entitled to sue, or may be sued, in the federal courts.

Where the interest involved was joint, each of the persons concerned in that interest must be competent to sue or liable to be sued, in those courts. This rule has been followed in *Florida Central Railroad v. Bell*, 176 U. S. 321 (1900); *Hoe v. Jamieson*, 166 U. S. 395 (1897); *New Orleans v. Winter*, 14 U. S. (1 Wheat.) 91 (1816); *Levering & Garriques Co. v. Morrin*, 61 F. 2d 115, 121 (2 Cir. 1932), aff'd 289 U. S. 103 (1933).

It cannot be claimed that the Oneida Nation of New York is a citizen of a state different than New York, and under 28 U. S. C. Section 1332 (a) (1) the appellants cannot claim that the Oneida Nation's lack of citizenship in a state other than that of New York creates diversity of citizenship.

The appellants cannot establish diversity of citizenship under 28 U. S. C. Section 1332 (a) (3), because even if the Oneida Nation of Wisconsin, Inc., should be considered as a citizen of Wisconsin for diversity purposes, the Oneida Nation of New York is not a foreign state.

This rule was established in *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 17-18 (1831).

The rule laid down in *Worcester v. Georgia*, 31 U. S. (6 Pet.) 515 (1832), is that state courts may not exercise jurisdiction over Indian tribal affairs or claims arising out of or relating to their restricted tribal lands.

POINT III.

No jurisdiction was acquired under Civil Rights Act, 42 U.S.C. Section 1983 and its implementations, 28 U.S.C. Section 1343 (3).

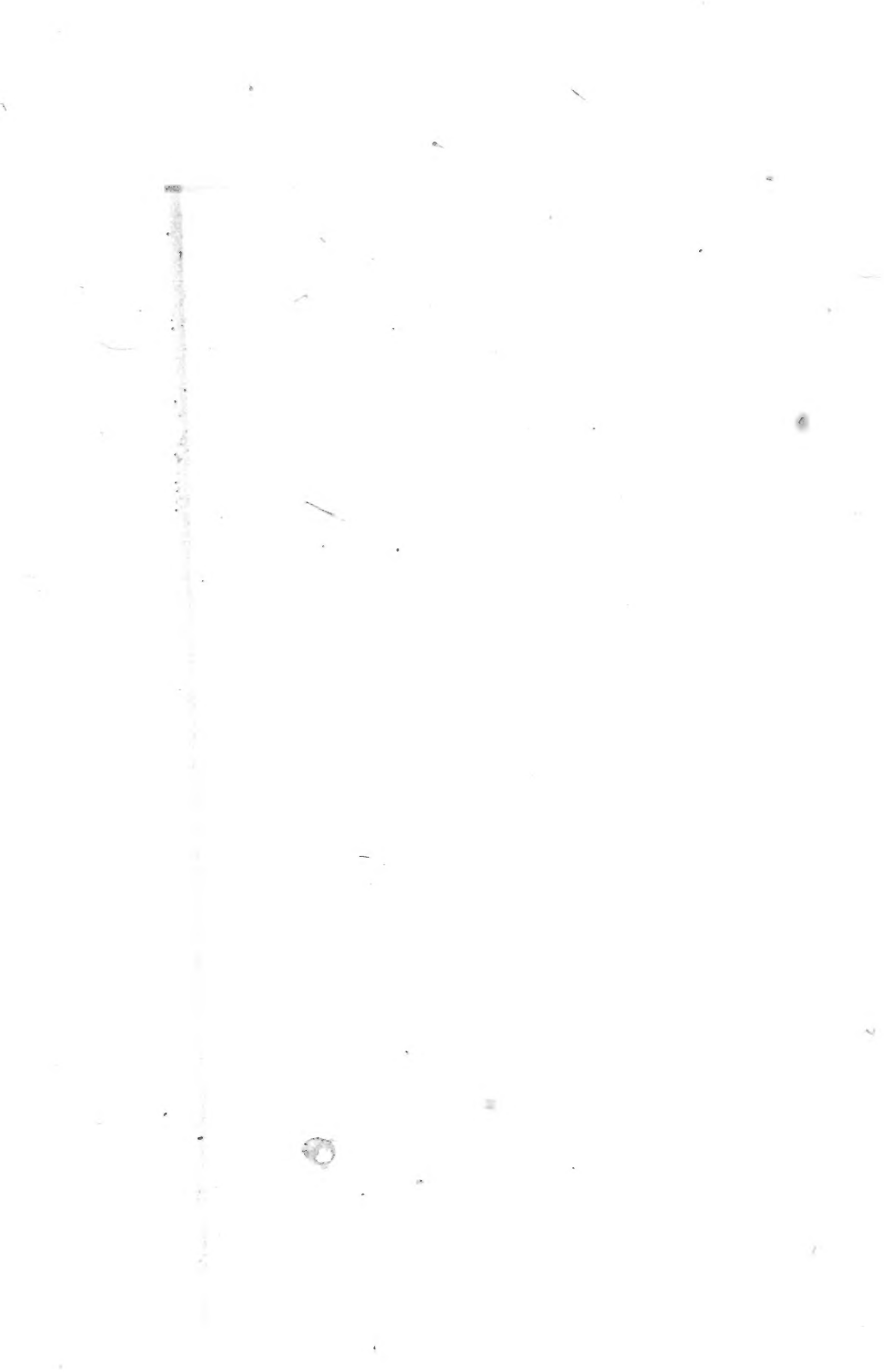
A county is not a "person" within the meaning of 42 U. S. C. Section 1983 and 28 U. S. C. Section 1343(3). *Monroe v. Pape*, 365 U. S. 167 (1961).

Conclusion.

The order of the District Court of the United States Court of Appeals for the Second Circuit should be affirmed and the complaint dismissed for lack of federal jurisdiction.

Dated: January , 1973.

WILLIAM L. BURKE,
Attorney for Appellee, County
of Madison,
29 Lebanon Street,
Hamilton, N. Y. 13346



IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., *Petitioners*,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, *Respondents*.

**BRIEF OF NATIVE AMERICAN RIGHTS FUND AS
AMICUS CURIAE IN SUPPORT OF THE PETI-
TION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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TION FOR A WRIT OF CERTIORARI TO THE
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SECOND CIRCUIT**

INTEREST OF AMICUS CURIAE

Petitioners and Respondents have filed with the Clerk of the Court a written stipulation consenting to the filing of this brief.

Amicus, Native American Rights Fund, is a non-profit corporation providing legal representation and

counsel to Indians and Indian tribes throughout the country in cases of major significance. The Fund is supported principally by private grants and contributions. Because its clients will be denied any judicial forum to litigate claims for land of which they are dispossessed if the decision of the Court below is allowed to stand, the Fund, and its clients, have a considerable interest in the outcome of this case.

STATEMENT

The decision below of the Second Circuit Court of Appeals affirms the ruling of the United States District Court for the Northern District of New York which dismissed the case for want of federal court jurisdiction.

The Oneida Tribes of New York and Wisconsin brought the suit for the rental value for years 1968 and 1969 of lands taken from the Tribes in 1795 allegedly in violation of federal law (the Indian Non-Intercourse Act, 1 Stat. 137 (1790), later Rev. Stat. § 2116, and now 25 U.S.C. § 177). The jurisdiction of the district court was founded on 28 U.S.C. § 1331 and § 1362 and other statutes not now in issue. In affirming the dismissal of the case, the Court of Appeals reasoned that the suit was one "basically in ejectment," and therefore a well-pleaded complaint need not contain an allegation of the Oneidas' source of title, but need only allege that the Tribes are the owners, in fee, of the lands in dispute. *The Oneida Indian Nation of New York State v. The County of Oneida, New York*, 464 F.2d 916 (1972). The "well-pleaded complaint rule" has developed over many years as an interpretation of 28 U.S.C. § 1331, specifically as a test of whether a case "arises under the Constitution, laws or treaties of the United States."

The court below, without analysis, concluded that this rule attaches to the same "arising under" language contained within 28 U.S.C. § 1362. Judge Lumbard, in his dissent, noted that the "arising under" language of § 1362 should not, of necessity, be burdened with the restrictive interpretation given to the same language in § 1331.

REASONS FOR GRANTING THE WRIT

Amicus concurs with the reasons for granting the Writ for Certiorari asserted in the Petition. In this brief, *amicus* emphasizes the consequences of the decision below on Indian tribes throughout the country and asserts an additional argument for this Court to grant the Writ.

AS A RESULT OF THE DECISION BELOW, INDIAN TRIBES HAVE NO JUDICIAL FORUM TO LITIGATE CLAIMS FOR LAND OF WHICH THEY ARE DISPOSSESSED

Because of the restrictive interpretation given by the Court of Appeals to 28 U.S.C. § 1362, the Oneida Tribes are precluded from litigating in federal court their claim for lands taken from them in 1795. As the court below recognized in Footnote 9 (464 F.2d 916 at 923), the Oneidas may not bring their suit in the state courts of New York. Since the challenged transaction by which the Oneidas were dispossessed occurred in 1795, the New York courts are barred from entertaining the Oneidas' suit by the following provision of 25 U.S.C. § 233:

that nothing herein shall be construed as conferring jurisdiction on the courts of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

The lack of a judicial forum is not a legislative oversight which will prejudice only the New York tribes. 28 U.S.C. § 1360 and 25 U.S.C. § 1322 impose on certain states, and permit other states to assume, civil jurisdiction over actions to which Indians are parties. Both statutes contain the same proviso that the state jurisdiction therein authorized or imposed does not confer on the states jurisdiction to adjudicate the ownership or right to possession of property held in trust by the United States for Indians or property subject to a restriction against alienation imposed by the United States (28 U.S.C. § 1360(b); 25 U.S.C. § 1322(b)). These provisos, and the similar language in 25 U.S.C. § 233, are codifications of judicial decisions reserving exclusively for federal courts the jurisdiction to hear claims involving the right to or possession of Indians lands. *U.S. v. Minnesota*, 305 U.S. 382 (1938); *Williams v. Lee*, 358 U.S. 217 (1959); see Footnote 9 to Judge Friendly's opinion below (464 F.2d 916 at 923).

Consequently, absent diversity jurisdiction pursuant to 28 U.S.C. § 1332, the interpretation of 28 U.S.C. § 1362 rendered by the Court of Appeals in this case will close *all* judicial doors to Indian tribes asserting claims for land of which the tribes do not have possession.

THE COURT OF APPEALS' INTERPRETATION OF 28 U.S.C. § 1362, NOT CONSTITUTIONALLY COMPELLED, RAISES SERIOUS CONSTITUTIONAL PROBLEMS

The dire consequences of the Court of Appeals' decision, as described above, militate for review of that decision by this Court. In addition, this Court should issue the Writ because the decision interpreting 28

U.S.C. § 1362 to include the "well-pleaded complaint rule" raises constitutional problems.

The court below transposed the "well-pleaded complaint rule" of 28 U.S.C. § 1331 to the same statutory phrase in 28 U.S.C. § 1362. But this transfer of statutory interpretation was not constitutionally compelled. As Judge Lumbard states in his dissent, "The 'arising under' language of the Constitution, § 1331, and § 1362 is virtually identical, yet the grant of jurisdiction under § 1331 has long been considered less generous than the Constitutional grant. Compare *Osborn v. Bank of the United States*, 9 Wheat. 739 (1824), with *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), and *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467 (1911)." 464 F.2d at 924.

By adopting, nonetheless, the "well-pleaded complaint rule" to dismiss the case, the court below cast constitutional doubt over 28 U.S.C. § 1360(b), 25 U.S.C. § 1322(b) and 25 U.S.C. § 233 which deny state court jurisdiction in suits such as in the instant case.

The due process clause of the Fifth Amendment has long been read to guarantee at least some judicial forum for aggrieved citizens. *Truax v. Corrigan*, 257 U.S. 312 (1921). More recently, Justice Harlan, speaking for this Court, stated:

[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 373 (1971). Justice Harlan was speaking of the due process clause of the Fourteenth Amendment, but the demands of the

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Fourteenth Amendment clause are no less stringent than the demands of the due process clause of the Fifth Amendment. *Bowles v. Willingham*, 321 U.S. 503 (1944). These statutes may also be infirm as violations of the constitutional guarantee of equal protection of the laws applicable through the Fifth Amendment to the activities of the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). If the decision below is allowed to stand, disallowing a federal court forum in which to litigate land claims of Indian tribes out of possession of the disputed land, the federal statutes denying a state court forum for such claims arguably discriminate invidiously against Indians, and such a racial classification is inherently suspect. *Brown v. Board of Education*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

This Court has often cautioned that a statute should always be interpreted with an eye to avoiding constitutional infirmities or doubts. *Crowell v. Benson*, 285 U.S. 22 (1932); *Ullmann v. United States*, 350 U.S. 422 (1956). Indeed, the Court in *U.S. v. Rumely*, 345 U.S. 41 (1953), stated that statutory words may be strained "in the candid service of avoiding a serious constitutional doubt." 345 U.S. 41 at 47. The Court of Appeals, we submit, ignored this caution and interpreted 28 U.S.C. § 1362 in such a way as to give birth to constitutional problems.

Consonant with the above cited cases, this Court should review the Court of Appeals' decision to ascertain if such constitutional problems may not be avoided. Petitioner, and *amicus*, maintain that the legislative history of 28 U.S.C. § 1362 does not warrant the interpretation given to that statute by the Court of

Appeals,* and that, without straining the language of the statute, it may be and should be interpreted so the constitutional doubts will fade.

CONCLUSION

Because of the dire consequences of the decision below on the availability of judicial redress for Indian tribes throughout the country, and the serious constitutional problems generated by the decision, *amicus*, Native American Rights Fund, joins with the petition-

* In recommending the enactment of what is now 28 U.S.C. § 1362, the Judiciary Committee of the House of Representatives noted that:

"In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that particularly as to this class of cases, it is appropriate that the actions be brought in a U.S. district court." House Report No. 2040, 89th Cong., 2nd Sess., (Oct. 3, 1966), p. 3146.

The Oneida complaint presents exactly the fact pattern which the above language demonstrates was intended by Congress to fall within the ambit of 28 U.S.C. § 1362. Furthermore, this same Committee was cognizant that federal courts have jurisdiction over suits brought by the United States as trustee for Indians or Indian tribes (28 U.S.C. § 1345), and that, for a variety of reasons, the United States declines to litigate some Indian actions. The Committee envisioned this bill as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought on their behalf by the government or by their own attorneys." House Report No. 2040, 89th Cong., 2nd Sess. (Oct. 3, 1966), p. 3147.

ing Tribes in requesting this Court grant the Writ of
Certiorari.

Respectfully Submitted,

DAVID H. GETCHES

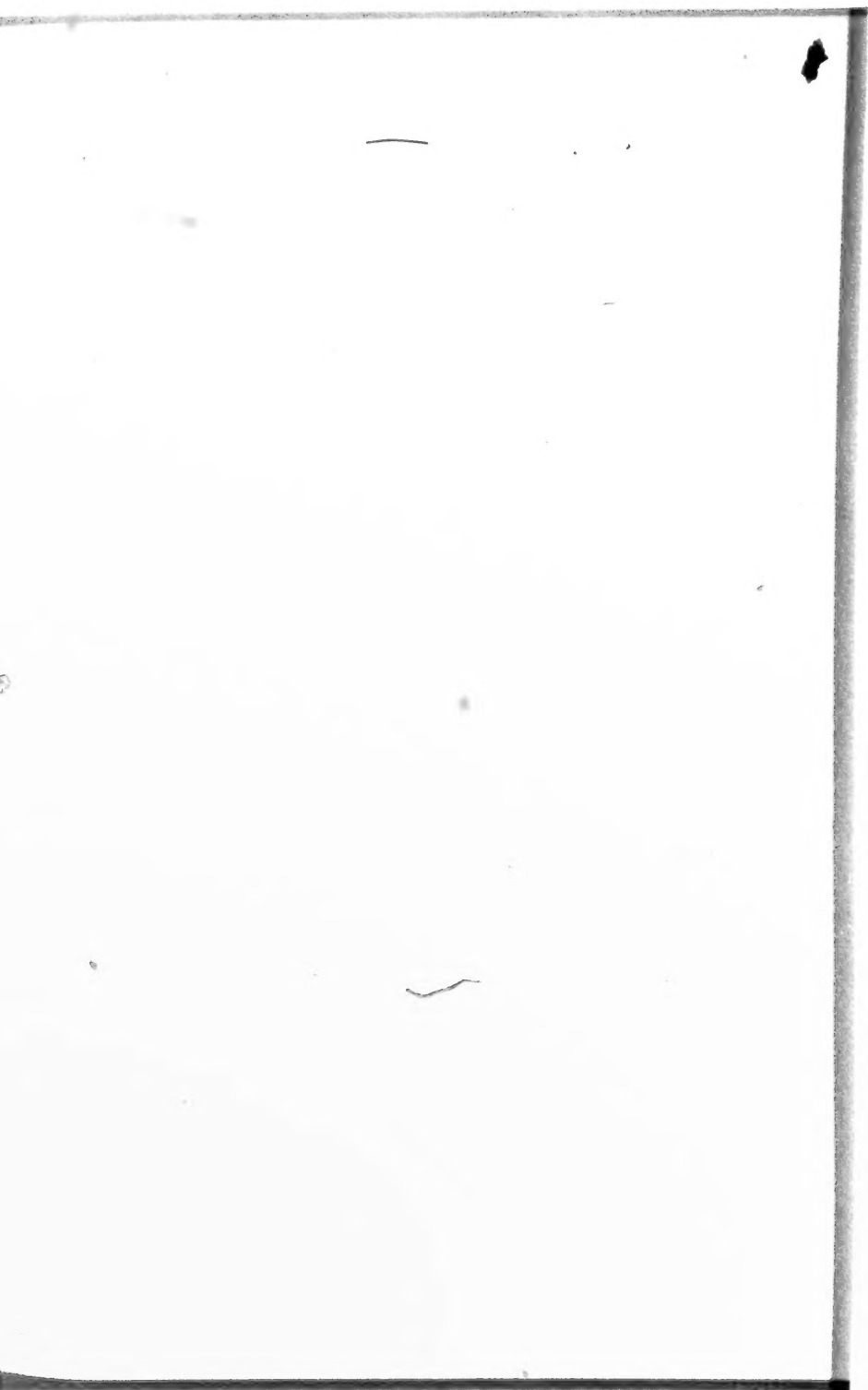
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**SUPPLEMENTAL
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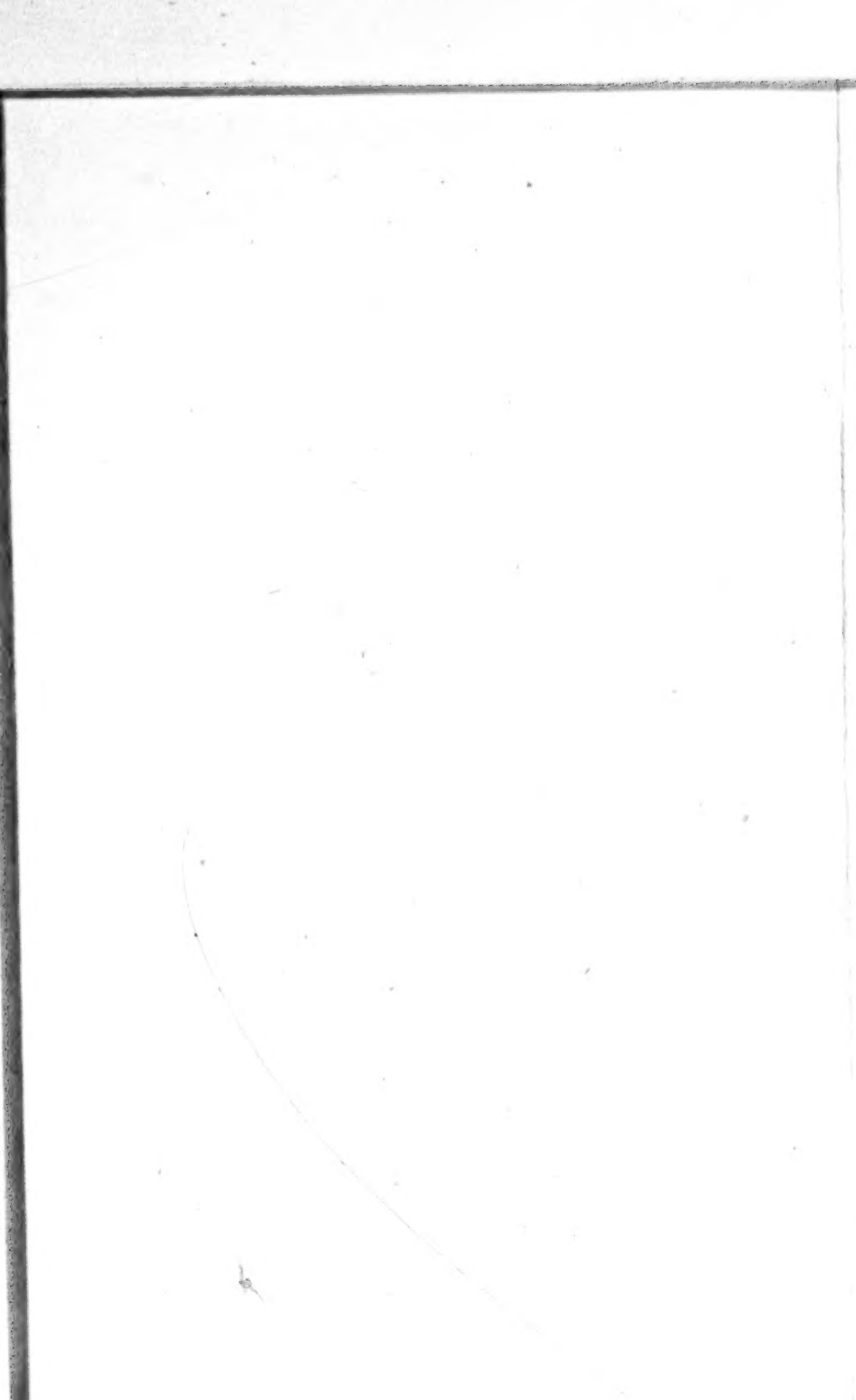


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STATEMENT

Since the filing of the petition herein, petitioners have learned of the decision in Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company an Arizona corporation; Salt River Valley Water Users' Association, an Arizona corporation, et al., decided by the federal District Court for Arizona December 11, 1972 and filed December 14, 1972 (unreported). This decision supports Point I of the petition and sheds additional light on the Ninth Circuit's prior holdings on Point II. This supplemental petition is filed pursuant to Rule 24(5) of the Supreme Court Rules.

SUPPLEMENTAL ARGUMENT

From the decision in Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, et al. (unreported), it appears that an action in trespass was brought by an Indian Tribe out of possession against certain non-Indians in possession of the Indians' alleged land. A motion to dismiss for lack of jurisdiction was denied, and Judge Murray flatly disagreed with the opinion of the Second Circuit in petitioners' case on the applicability of 28 U.S.C.A. 1362 and concurred with the position urged by petitioners herein:

"In 1966 Congress passed 28 U.S.C. 1362 upon which the complaint herein relies for jurisdiction and which provides that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Judge Friendly held in Oneida Indian Nation of N. Y. State v. County of Oneida, N. Y., 464 F. 2d 916, 919 note 4 (1972) that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. Contrary to Judge Friendly's holding and consistent with Judge Lumbard who dissented in the Friendly decision this court finds that House Report No. 2040, which accompanied S. 1356 (28 U.S.C. 1362), indicates that in addition to removing the \$10,000 jurisdictional requirement of 28 U.S.C. 1331 the effect of the bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action. U.S.C.C. & A.N. 1966, p. 3147. Reading these sections (25 U.S.C. 175, 28 U.S.C.

§§1331 and 1362) together it is apparent that this court has under §1362 a statutory grant of jurisdiction in this matter. Under §1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys."

In a later section of Judge Murray's opinion, the case of Skokomish Indian Tribe v. France, 269 F. 2d 555 (9 Cir. 1959) is cited for the proposition that the United States is not an indispensable party because the defendants could raise any defense (in proof of their right of possession) which could be raised by the United States. As thus interpreted by Judge Murray, the Skokomish case stands for the proposition that the plaintiff claiming under a treaty need not be in possession in order to bring an action - contra to the holding of the Second Circuit.

It appears that the Skokomish Tribe were out of possession and were claiming lands under federal treaty which non-Indians had been occupying for many years. See Op. in 320 F. 2d 205 (1963).^{1/} On the jurisdictional issue, the Ninth Circuit Court of Appeals held at 269 F. 2d 555, 558, 559:

"It is therefore our conclusion that under the allegations of the complaint a claimed right created by treaty is an essential element of appellant's cause of action. It is a right which will be supported if the treaty is given the construction for which appellant contends, and defeated if given the construction advocated by appellees. The controversy as to the meaning of the treaty is a genuine

^{1/} As alleged in the petitioners' complaint, par. 20, A48, the Oneida Indians too have sought the help of the United States, as trustee, and have been denied such help.

and present controversy. It is not specifically alleged in the complaint that appellees contest appellant's interpretation of the treaty. But this is necessarily to be inferred from the allegations concerning the nature of the claims which appellees assert.

"It follows that the complaint meets the essential tests requisite to the existence of federal-question jurisdiction under 28 U. S. C. A. §1331." ^{2/}

* * * * *

"We accordingly hold that the district court had federal-question jurisdiction under §1331. It was therefore error to dismiss the action as to all defendants for want of jurisdiction of the subject matter."

CONCLUSION

The Salt River decision reinforces petitioners' contentions that (a) 28 U. S. C. A. 1363 merits a broader interpretation than 28 U. S. C. A. 1331, and (b) possession of the land is not the crucial factor where claim is under a federal law or treaty.

If the Salt River decision and the decision of the court below both stand, then Indian Tribes in the Ninth Circuit area will have greater rights to protect their lands than Indian Tribes in the Second Circuit's area.

^{2/} It appears that the Ninth Circuit Court of Appeals interprets Shulthis v. McDougal, 225 U. S. 561, (1911) contra to the interpretation of the majority of the Second Circuit in petitioners' case.

For the reasons set forth in the petition and this supplemental petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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January 19, 1973.

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MICHAEL ROSEN, JR., CLERK

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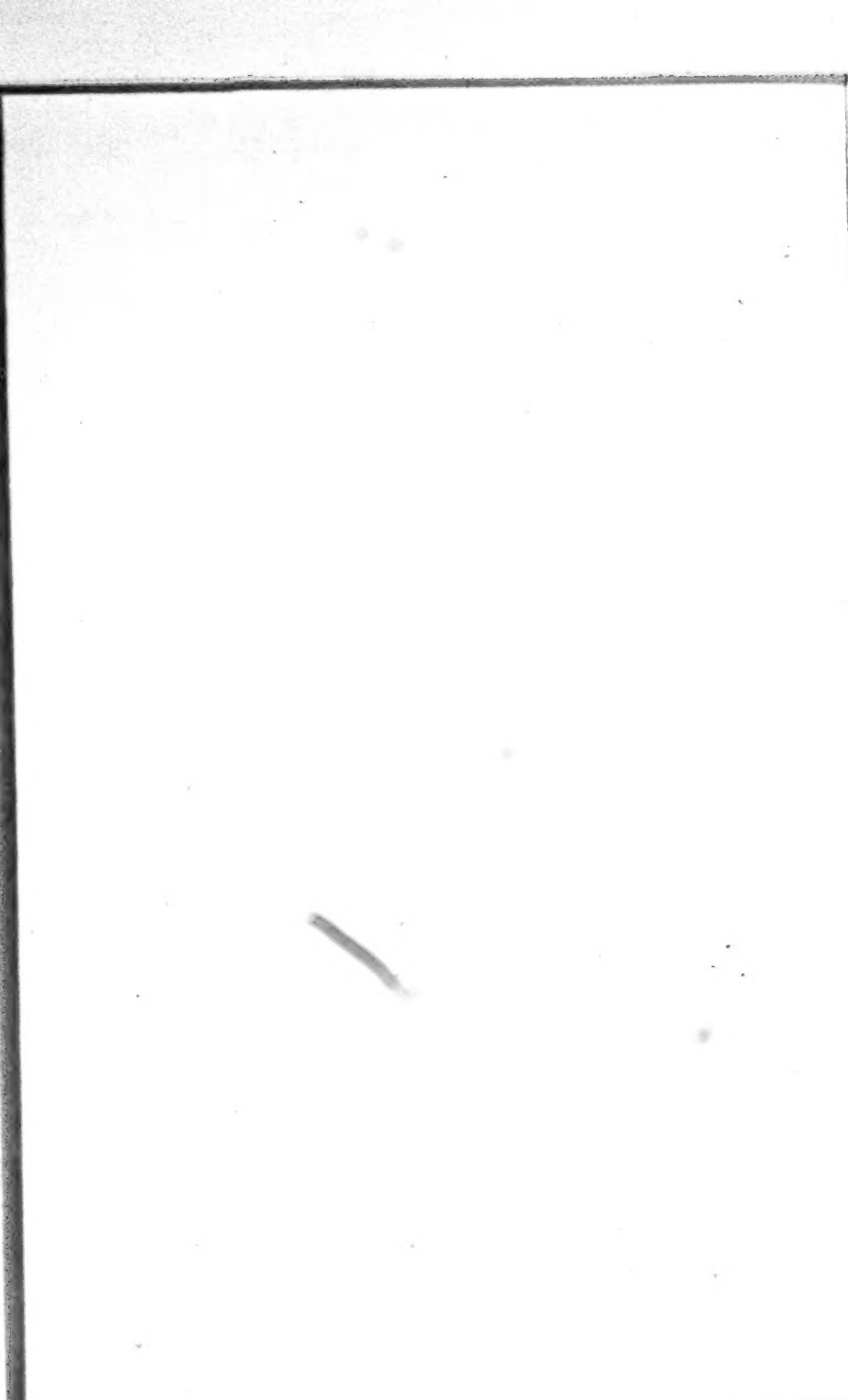


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SECOND CIRCUIT

This constitutes an appendix to the supplemental information filed in the above case. The matter herein is a copy of the decision in Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, et al, referred to in the supplemental petition.

MEMORANDUM AND ORDER.

**"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

**SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY,**

Plaintiff,

vs.

**ARIZONA SAND AND ROCK COMPANY,
an Arizona corporation; SALT RIVER
VALLEY WATER USERS' ASSOCIATION,
an Arizona corporation, et al.,**

Defendants.

No. Civ 72-376-Phx.
**MEMORANDUM
AND ORDER**

Before the court are motions to dismiss for lack of jurisdiction by Mesa Sand and Rock, Inc., John L. Merrill, Mrs. John L. Merrill, John L. Merrill, Administrator of the Estate of Ira L. Merrill, Sarah Ann Ickes, John Doe Ickes, husband of Sarah Ann Ickes, Gilbert Allen Merrill and Mrs. Gilbert Allen Merrill, Ira Keith Merrill and Mrs. Ira Keith Merrill, and by defendant Arizona State Highway Commission along with a motion to dismiss for failure to state a claim upon which relief may be granted by defendant United States. There is in addition a petition by the plaintiff for an order to show cause why the U. S. Attorney should not be ordered to prosecute suit on behalf of the tribe. Further, the defendants Arizona State Highway Commission have also moved to join the United States as a necessary or indispensable party. The motions of the private and corporate defendants rely upon Shulthis

Memorandum and Order.

v. McDougal, 225 U.S. 561 (1911) which held that under the well pleaded complaint rule jurisdiction is insufficient where the only federal ingredient in the suit is that the plaintiff's title was derived from the United States. The United States has moved to dismiss count two of the complaint which asks for a writ of mandamus under 28 U.S.C. 1361, ordering the Department of Justice to prosecute the allegations of trespass levied against the private and corporate defendants in count one of the complaint. For the following reasons the court has determined that this court has jurisdiction, that the complaint states no grounds upon which to issue the writ of mandamus, and further that the United States is not an indispensable party.

Under 25 U.S.C. 175 the United States Attorney has authority to represent Indians in all suits at law and in equity. Under recent 9th Circuit decisions this authority has been held discretionary. Rincon Band of Mission Indians v. Escondido Mut. Wat. Co., 459 F.2d 1082 (1972); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d (1958) and Siniscal v. United States, 208 F.2d 406 (1953). It is clear that should the United States choose to exercise its discretion it could file suit in this case under 28 U.S.C. 175 and as guardian and trustee for the tribe. United States v. Kagama, 118 U.S. 375 (1886), United States v. Sandoval, 231 U.S. 28 (1913), etc.

[In 1966 Congress passed 28 U.S.C. 1362 upon which the complaint herein relies for jurisdiction and which provides that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Judge Friendly held in Oneida Indian Nation of N. Y. State v. County of Oneida, N. Y., 464 F.2d 916,

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919 note 4 (1972) that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. Contrary to Judge Friendly's holding and consistent with Judge Lumbard who dissented in the Friendly decision this court finds that House Report No. 2040, which accompanied S. 1356 (28 U.S.C. 1362), indicates that in addition to removing the \$10,000 jurisdictional requirement of 28 U.S.C. 1331 the effect of the bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action. U.S.C.C. & A.N. 1966, p. 3147. Reading these sections (25 U.S.C. 175, 28 U.S.C. §§1331 and 1362) together it is apparent that this court has under §1362 a statutory grant of jurisdiction in this matter. Under §1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys.]

In its petition for order to show cause and subsequent memoranda the plaintiff relies upon 43 U.S.C. 1457, 28 U.S.C. §§519 and 547, and 25 U.S.C. 175 as a basis for its contention that the United States has a duty to prosecute the charges in the complaint. In addition plaintiff establishes that the United States is a trustee of the land in question for the Indians and as such has a duty to obtain redress from those who trespass upon it. Neither theory creates a duty upon the United States. As stated above there is no duty under 25 U.S.C. 175 which requires the United States to pursue any civil action on behalf of a tribe (Rincon Band of Mission Indians, supra) and the plaintiff concedes that §175 is not mandatory. If that statute does not require representation, then there is no compelling rationale which would create a duty as the result of

Memorandum and Order.

the trust relationship and the plaintiff cites no authority for such.

Mandamus is not available as a means of compelling government officials to perform their discretionary functions in any particular way. It empowers a court only to enforce ministerial duties, not to perform discretionary acts involving the exercises of judgment. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966). None of the statutes relied upon by the plaintiff expressly establish a duty of the United States to provide legal representation to the plaintiff. Further there are no specific factual allegations to support the contention that federal defendants have arbitrarily and wrongfully refused to undertake appropriate litigation.

The United States and the defendant Arizona Highway Commission have both pointed out in their memoranda that alleged trespassers were operating under permits, agreements and licenses issued or ultimately derived through various branches of the United States government. The plaintiff does not deny this and a letter written by Assistant Secretary Loesch, Bureau of Land Management, and attached to the United States supplementary memorandum, supports this allegation. On the basis of the record before it the court must conclude that should the United States represent the tribe in this matter ultimately a conflict of interest would result and therefore it is within the sound discretion of the Attorney General to refuse to do so.

The motion to join the United States as an indispensable party is denied. In this matter this court is bound by the 9th Circuit decision of Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (1959). It does not appear that failure to join the United States would radically and injuriously affects its interest nor will

Memorandum and Order.

a final determination be inconsistent with equity and good conscience. The defendants may raise all the issues with regard to ownership and control of the land that might be raised by the United States. Further if it should be determined that the United States has power to authorize the entry then it will be found that in fact there could be no trespass.

THEREFORE IT IS ORDERED and this does order that the motions of defendants Mesa Sand and Rock, Inc., John L. Merrill, Mrs. John L. Merrill, John L. Merrill, Administrator of the Estate of Ira L. Merrill, Sarah Ann Ickes, John Doe Ickes, husband of Sarah Ann Ickes, Gilbert Allen Merrill and Mrs. Gilbert Allen Merrill, Ira Keith Merrill, Mrs. Ira Keith Merrill and the Arizona State Highway Commission to dismiss for lack of jurisdiction be and the same is hereby denied, as is the motion of the Arizona State Highway Commission to join the United States under F. R. C. P. 19 as an indispensable party.

Further, inasmuch as the defendant United States has shown, pursuant to the order to show cause, that the decision to prosecute on behalf of the tribe is a discretionary one and the decision of the United States not to prosecute was not an abuse of that discretion therefore the motion to dismiss the claim against the defendant United States be and the same is hereby granted.

Further the defendants are granted 20 days within which to further plead.

Done and dated this 11th day of December, 1972.

s/ W.D. MURRAY
W. D. Murray
Senior United States
District Judge. "

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No. 72-851

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE ONEIDA INDIAN NATION OF NEW YORK STATE, ALSO
KNOWN AS THE ONEIDA INDIANS OF NEW YORK, AND
THE ONEIDA INDIAN NATION OF WISCONSIN, ALSO
KNOWN AS THE ONEIDA TRIBE OF INDIANS OF WISCON-
SIN, INC., PETITIONERS

v.

THE COUNTY OF ONEIDA, NEW YORK AND THE
COUNTY OF MADISON, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-29) is reported at 464 F. 2d 916. That court's denial of a petition for rehearing and suggestion of rehearing *en banc* (Pet. App. 30) is not officially reported. The opinion of the United States District Court for the Northern District of New York (Pet. App. 31-41) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1972. Petitioners' motion for rehearing was denied on September 11, 1972. The petition for a writ of certiorari was filed on December 9, 1972. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether claims by Indian tribes to the ownership of land, relying on three treaties and the Non-Inter-course Act of 1790, were properly dismissed for want of jurisdiction under 28 U.S.C. 1362 because of the "well pleaded complaint" rule.

STATUTES AND TREATIES INVOLVED

The Non-Intercourse Act of 1790, 1 Stat. 137, now 25 U.S.C. 177, provides in relevant part:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

* * * * *

28 U.S.C. 1331(a) reads as follows:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

80 Stat. 880, 28 U.S.C. 1362, provides:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Article II of the Treaty of Fort Stanwix, dated October 22, 1784, 7 Stat. 15, provides:

The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

Article 3 of the Treaty of Fort Harmar, dated January 9, 1789, 7 Stat. 34, provides:

The Oneida and Tuscarora nations are also again secured and confirmed in the possession of their respective lands.

Articles II and VII of the Treaty with the Six Nations, dated November 11, 1794, 7 Stat. 45-46, provide:

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Lest ~~the firm~~ peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

STATEMENT

This brief is submitted in response to the Court's order of February 20, 1973, inviting the Solicitor General to express the views of the United States in this case.

Petitioners, two Indian Nations, filed a complaint in the United States District Court for the Northern District of New York challenging a 1795 sale of tribal

lands, allegedly in violation of Indian treaties between the United States and the Oneidas and five other tribes known as the Six Nations, confirming their right to possession, and the Indian Non-Intercourse Act of 1790 (now 25 U.S.C. 177). The Oneidas demanded recognition of their ownership of these lands and payment for their fair rental value to the extent of at least \$10,000. The district court dismissed the complaint for lack of jurisdiction, and this was affirmed by a divided panel of the Second Circuit.

DISCUSSION

The court of appeals considered three asserted bases of federal jurisdiction and rejected all of them. These were (1) the existence of a federal question, (2) diversity of citizenship, and (3) the Civil Rights Act, 42 U.S.C. 1983, and 28 U.S.C. 1343(3). In this memorandum, attention will be limited to the first of these, namely, the existence of a federal question. This turns on the question whether the "well pleaded complaint" rule applies to the claims stated in the complaint filed in this case.

1. Insofar as ordinary claims are concerned, it is long and well established that the "well pleaded complaint" rule is applicable in determining the existence of a federal question under the general federal question statute, 28 U.S.C. 1331. Thus, it is established that a complaint in an action basically in ejectment presents no federal question even though a plaintiff's claim or right of title is founded on a federal statute, patent or treaty. *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 201; *Taylor v. Anderson*, 234 U.S. 74; and other cases cited in the opinion below at Pet. App. 19.

2. In 1958, Section 1331 was amended. The only change made was to increase the jurisdictional amount from \$3,000 to \$10,000. Public Law 85-554, 72 Stat. 415. There is nothing, either in the statutory provision, or in its legislative history, to indicate that Congress was dissatisfied with the "well pleaded complaint" rule. The language of the statute was reenacted without change, except for the increase in the jurisdictional amount.

Apparently the increase in the jurisdictional amount caused difficulties with respect to certain Indian land claims. As a result, in 1966 Congress enacted Public Law 89-635, 80 Stat. 880, which added 28 U.S.C. 1362 to the Code. This is the provision under which the present case is brought. The language of this section is identical with that in Section 1331, except that it removes the jurisdictional amount requirement with respect to "all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."

The present suit comes within this statute. The statute makes no reference, direct or indirect, to the "well pleaded complaint" rule. The question here, then, is whether Congress repealed that rule when it used in Section 1362 the identical language with respect to "jurisdiction of all civil actions * * * aris[ing] under * * *" which it had long used in Section 1331.

3. This is a technical question of statutory construction and of federal jurisdiction and procedure. It is not an easy question. In last analysis, it probably turns on whether the statute should be construed

broadly and loosely (in the sense that it would be construed to achieve a result not stated or adverted to by Congress) because it is a statute involving Indian claims, or whether it should be construed more precisely and narrowly because it is a statute involving federal jurisdiction. Putting the same question another way, the question is whether the language used in Section 1362 should be construed to repeal the "well pleaded complaint" rule when Congress said nothing to that end, and when the identical language in Section 1331 does embody the "well pleaded complaint" rule pursuant to long established decisions of this Court.

4. There is legislative history which is relevant, though inconclusive. This is found in S. Rep. No. 1507, 89th Congress, 2d Session, dated August 24, 1966. This report states that:

The purpose of the bill as amended is to permit Indian tribes to bring civil actions arising under the Constitution, treaties, and laws of the United States, without regard to the \$10,000 limitation, and accordingly amends chapter 85, title 28, United States Code, by adding a new section.

There is nothing in this which relates to the "well pleaded complaint" rule. The sole purpose stated is that the Bill will repeal the \$10,000 jurisdictional amount.

The report then states that—

* * * the jurisdictional limitation works an especial hardship on Indian tribes. In many instances claims arise under special treaties between the United States and the tribes, but

because of the limitation the matter cannot be litigated in Federal courts. * * *

The report does include a reference to "parcels of land" (in a context of jurisdictional amount), and a letter from the Interior Department printed at the close of the report refers to "litigation involving tribal lands," again in connection with the proposal to remove the jurisdictional amount requirement. A letter from the Department of Justice, also printed at the close of the report, says that "the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes under the Constitution, laws, or treaties of the United States * * *." But, again, there is no reference to the "well pleaded complaint" rule, and the thrust of the letter is solely on the matter of eliminating the \$10,000 jurisdictional amount.¹

The report concludes by saying that "The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys." This language, standing alone, might seem to indicate that Congress was intending to enact a broad general statute authorizing the Indians to bring suit in the federal courts, without regard to any restrictions. However, the only restriction referred to in the statute, or clearly in the legislative history, is the jurisdictional amount.²

¹ The House report is essentially the same. H. Rep. No. 2040, 89th Congress, 2d Session. The hearings were not printed. We have located a typed copy, and this is being lodged with the Clerk.

² In their supplemental petition, the petitioners contend, in effect, that there is a conflict with the decision of the Court of

5. Repealing the "well pleaded complaint" rule with respect to Indian claims would be a major step which should not be lightly imputed to Congress. Although the present claim involves only two parcels of land, the jurisdictional decision would be applicable to large areas of land in upstate New York, as well as other areas. Congress has already acted on the general problems by adopting the Indian Claims Act. The claims available there are different from those raised here, which are against private parties; but if there is to be relief on a broader scale, the question should be fully considered by Congress and Congress should make the policy determination. It is clearly within the power of Congress, and Congress has made no explicit change in the "well pleaded complaint" rule in more than 100 years. Nor has Congress given the federal courts general jurisdiction over Indian claims except in terms of

Appeals for the Ninth Circuit in *Skokomish Indian Tribe v. France*, 269 F. 2d 555. However, that was "a trespass and quiet-title action." 269 F. 2d at 556. It was brought under 28 U.S.C. 1331. It may be that the "well pleaded complaint" rule could have been raised, but no question was raised on that issue, presumably because it was thought inapplicable in such a suit. The court of appeals held that there was jurisdiction under Section 1331, but it did not deal with or pass upon the issue involved in this case. Thus, there is no conflict of decision in the courts of appeals.

There is, however, a conflict with the decision of the District Court for the District of Arizona in *Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.* See supplemental petition 2-3. In that decision Judge Murray referred to the opinion below, and refused to follow it. This, however, does not represent a conflict between the courts of appeals.

a federal jurisdiction requirement, which, historically, incorporates the "well pleaded complaint" rule.³

6. The Oneida Tribe has filed a claim under the Indian Claims Act, and this case is now pending before the Indian Claims Commission, and is being defended by the Department of Justice. In that sense, there is a conflict of interest, which should be disclosed. However to the extent that this case is a federal jurisdiction case, the conflict of interest is not very relevant. The Court has asked the Solicitor General to state his view. He concludes, not without difficulty, that the decision below is correct, and that certiorari should be denied.

7. This view is not shared by all government lawyers, either within or outside the Department of Justice. Some lawyers view this as essentially an Indian case, rather than a federal jurisdiction case. They find in the legislative history general support for the claims of Indians, above and beyond anything actually stated by Congress.

In particular, the Acting Solicitor of the Department of Interior, under date of March 21, 1973, has

³ It is contended by the *amicus curiae* (Native American Rights Fund Br. 3) that no remedy is available to the petitioners in the state courts. The court below did not pass on this, simply raising the question whether there was any such lack of jurisdiction in the state courts. (See opinion below, Pet. App. 25, n. 9.)

The contention that the state courts have no jurisdiction is based on 25 U.S.C. 233, enacted in 1950, which provides that "nothing herein contained" shall give the state courts jurisdiction of such claims. It does not follow, however, that the state courts do not have jurisdiction apart from this statute. The question appears to be an open one in the state courts.

written to state his "reasons why we think the United States should recommend that certiorari be granted," and has asked that his views be made known to the Court. His letter continues as follows:

To us the significance of the *Oneida* case is the interpretation which should be accorded to 28 U.S.C. § 1362. By two-to-one decision, the Second Circuit has concluded that the "well-pleaded complaint rule" developed as a result of interpreting 28 U.S.C. § 1331 must also be applied to § 1362.

We think the legislative history of § 1362 clearly shows that it is a statute intended to enable Federally recognized Indian tribes to litigate in the Federal courts all questions pertaining to their rights arising from lands claimed by them. As both the petitioners and the Native American Rights Fund as *amicus curiae* point out respectively in their petition and brief, unless the Federal courts have jurisdiction of such a claim as presented by the *Oneidas* it may not be litigated since state courts have no jurisdiction to try suits involving rights to Indian lands.

Indicative of the Congress' intent that all Indian land cases may be litigated by Federally recognized Indian tribes in Federal courts pursuant to § 1362 is the following portion of the statement contained in Senate Report No. 1507, 89th Congress, 2nd Session, reporting on S. 1356, which became § 1362. The portion of the statement to which we refer appears on page 2 of Report No. 1507 and reads as follows:

"There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have

had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys."

The present case classically illustrates an instance of what the Senate Judiciary Committee had in mind, for the suit is brought by tribal attorneys since the United States, which is defending against an Oneida claim filed pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* involving aspects of the claim being pursued by the Oneida Nation against Oneida and Madison County, declined to file an action on behalf of the Nation.

I shall appreciate your bringing the foregoing views of the Department of the Interior to the attention of the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

ERWIN N. GRISWOLD,
*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

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**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE**

In footnote two on pages eight and nine of our original memorandum we stated that while there is a conflict between the decision of the court of appeals in this case and a decision of the District Court for the District of Arizona there is no conflict between the courts of appeals. Subsequent to filing our memorandum we received a copy of a decision of the United States Court of Appeals for the Ninth Circuit filed on May 16, 1973, in *The Fort Mojave Tribe v. William L. Lafollette*,

et al., No. 71-1967. Although it contains no reasoned discussion, and may be distinguishable on its facts, this decision does seem to represent a conflict between the courts of appeals on the jurisdictional question presented by this case.

We have reproduced the decision in full as an appendix to this supplemental memorandum.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1973.

APPENDIX

*IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

No. 71-1967

THE FORT MOJAVE TRIBE

v.

WILLIAM L. LAFOLLETTE ET AL.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA*

[May 16, 1973]

Before: **HAMLIN, BROWNING AND WRIGHT**, Circuit Judges.**WRIGHT**, Circuit Judge:

This is an appeal from an order dismissing an amended complaint on the ground that the United States was an indispensable party to the litigation. The appellant, an Indian tribe acknowledged by the government pursuant to statute [25 U.S.C. §476], brought suit to quiet title as against claims of the defendants to land in Arizona. The complaint did not allege who was in possession but asserted that defendants made some claim adverse to the title of the tribe.

The tribe asserts a superior right under Executive Order No. 1296, February 2, 1911, by which the United States withdrew from settlement certain land in (the territory of) Arizona and set it apart

“as an addition to the present Fort Mojave Indian Reservation . . . , for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon.”

Defendants moved to dismiss the action on several grounds, including lack of subject matter jurisdiction and failure to join an indispensable party. The latter ground was the one relied upon by the district court in dismissing without prejudice. It was the view of the trial judge that the Executive Order did not transfer title and no trust patent had been issued to the land in question, leaving title in the government.¹

I.

THE INDISPENSABLE PARTY ISSUE

Without joining the United States, an Indian tribe may sue in its own right to protect its interest in restricted land. *Choctaw & Chickasaw Nations v. Seitz*, 193 F. 2d 456 (10th Cir. 1951). It is of no consequence that no trust patent had been issued for the land involved. See *Skokomish Indian Tribe v. France*, 269 F. 2d 555 (9th Cir. 1959).

As the United States will not be bound by any determination made in a suit to which it is not a party, *United States v. Candelaria*, 271 U.S. 432 (1926),

"It does not appear that failure to join the United States would radically and injuriously affect its interest nor will a final determination be inconsistent with equity and good conscience." *Salt River Pima-*

¹Defendants urge this court to uphold the order of dismissal on the grounds that the federal court in Arizona was without jurisdiction because the land in question was in California. Plaintiff replies that by virtue of the Interstate Compact Defining Boundary between the States of Arizona and California, approved by Congress August 11, 1966, Stat. —, the land is in Arizona. Obviously this is a factual question which should be resolved by the trial court in the first instance.

Maricopa Indian Community v. Arizona Sand and Rock Co., 353 F. Supp. 1098, 1101 (D. Ariz. 1972).

Our *Skokomish* decision is controlling here, and the order of dismissal was improper.

II.

JURISDICTION OF THE DISTRICT COURT

The appellant Indian tribe's claim of federal jurisdiction is based on 28 U.S.C. §1362.² Defendants argue that §1362 retains the requirements for federal question jurisdiction that have been judicially engrafted onto 28 U.S.C. §1331, and that these have not been met here.

It is doubtful that the requirements of §1331 are met in the present case whether the plaintiff's suit be styled

² 28 U.S.C. §1362 provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

as an action in ejectment³ or one to quiet title.⁴ But we agree with the dissenting opinion of Judge Lumbard in *Oneida Indian Nation of New York State v. County of Oneida*, 464 F. 2d 916, 924 (2d Cir. 1972) that Congress intended by §1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act. *Accord: Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, supra*. As so interpreted the statute is clearly constitutional. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

Scholder v. United States, 428 F. 2d 1123, 1125 (9th Cir. 1970), and *Quinault Band of Indians v. Gallagher*, 368 F. 2d 648, 656 (9th Cir. 1966), do not hold otherwise.

Reversed and remanded.

³ The action was designated an action to quiet title but there is no allegation the plaintiff is presently in possession of the lands in controversy. If plaintiff is out of possession it has an adequate remedy at law in ejectment and an action to quiet title will not lie. *Whitehead v. Shattuck*, 138 U.S. 146 (1891); *Oneida Indian Nation of New York State v. County of Oneida*, 464 F. 2d 916 (2d Cir. 1972); cf. *Roubedeaux v. Quaker Oil & Gas Co.*, 23 F. 2d 277 (8th Cir. 1927). But if the plaintiff's proper remedy is an action in ejectment "a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no federal question [under 28 U.S.C. §1331] even when a plaintiff's claim of right or title is founded on a federal statute, patent or treaty [cits omitted]." *Oneida Indian Nation, supra* at 920.

⁴ While an action to quiet title will present a federal question under 28 U.S.C. §1331 if the complaint alleges a substantial controversy between the parties regarding the interpretation or effect of federal law, *Skokomish Indian Tribe v. France*, 269 F. 2d 555 (9th Cir. 1959), the present complaint includes no such allegation.

"[A] controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Shulthis v. McDougall*, 225 U.S. 561 (1912).

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SUPREME COURT. No 72-851

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IN THE
Supreme Court of the United States
October Term, 1972

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known
as the ONEIDA NATION OF NEW YORK, also known as the
ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN
NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF
INDIANS OF WISCONSIN, INC.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF
MADISON, NEW YORK,

Respondents.

**REPLY TO MEMORANDUM FOR THE
UNITED STATES AS AMICUS CURIAE**

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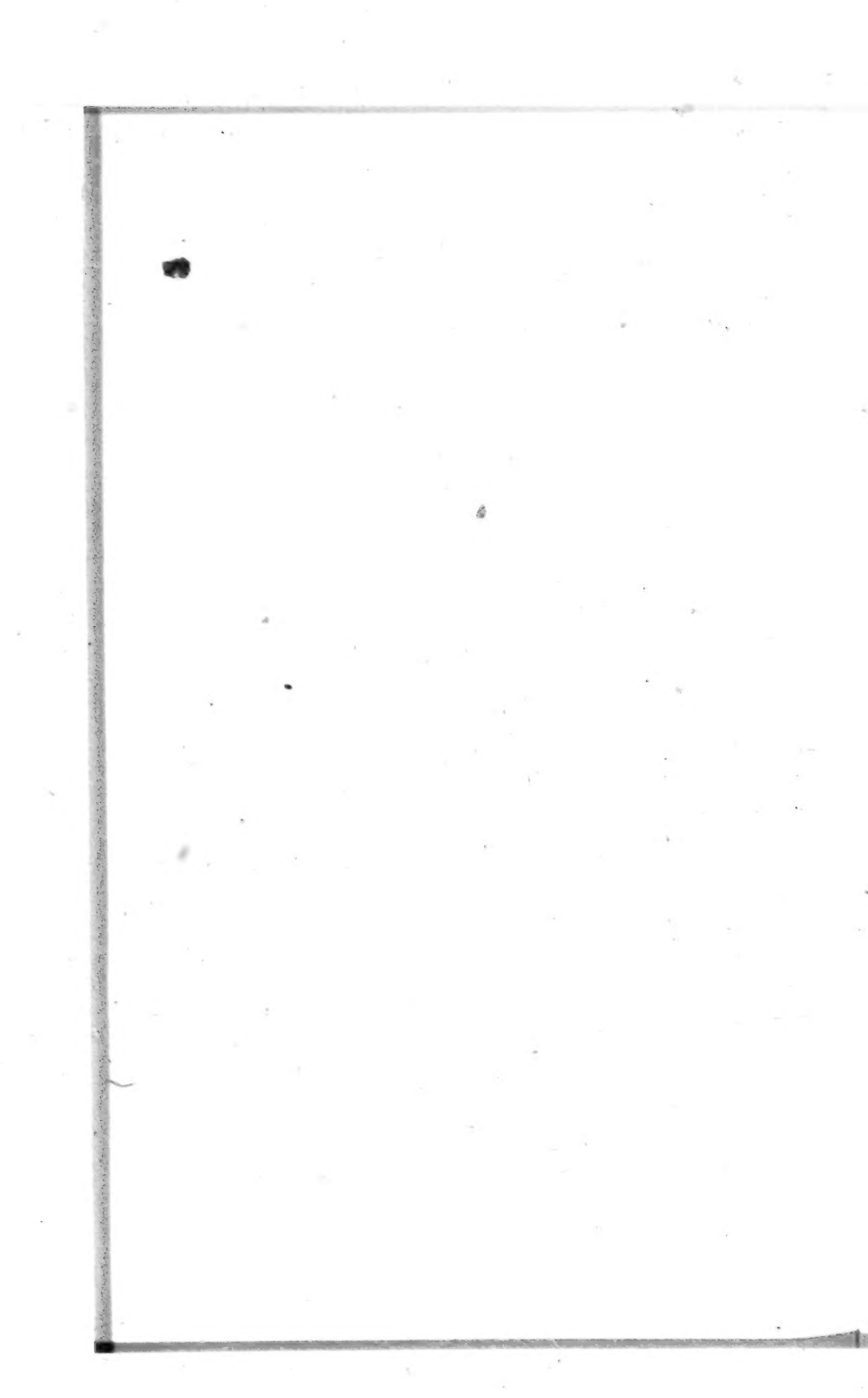
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Respondents.

**REPLY TO MEMORANDUM FOR THE
UNITED STATES AS AMICUS CURIAE**

STATEMENT

This is a reply to the Memorandum For The United
States as Amicus Curiae heretofore filed in this Court.

DISCUSSION

1. The Memorandum for the United States indicates
that the sole purpose of enactment of 28 U.S.C. 1362
is to repeal the \$10,000 jurisdictional amount limitation
as to Indian Tribes. However, the official heading of
the bill reads as follows:

"

AN ACT

To amend the Judicial Code to permit Indian tribes
to maintain civil actions in Federal district courts
without regard to the \$10,000 limitation, and for
other purposes." [Emphasis Added]

Thus removal of the \$10,000 was not the sole purpose. What the "other purposes" are must be gleaned from the Legislative History of the bill. As shown in our prior briefs, the documents before Congress are replete with the concept that Indian tribes would or might be suing in Federal court while not in possession of the disputed land.

A further indication that more than a change in jurisdictional amount was intended is the further provision concerning 28 U. S. C. 1362 that:

"Sec. 2. The chapter analysis of chapter 85 of title 28 of the United States Code is amended by adding at the end thereof the following new item:

'1362 Indian tribes.'."

See Public Law 89-365, 89th Congress, S. 1356; 62 Stat. 930; approved October 10, 1966. Thus the chapter analysis characterizes the new section: "Indian Tribes", a broad, generalized section and not merely as an exception to the \$10,000 rule.

2. In footnote 2 on page 8, the Memorandum for the United States states that the "well pleaded complaint" rule was not an issue before the Ninth Circuit in Skokomish Indian Tribe v. France.

We believe, on reading of the opinion and the appellate briefs in the Skokomish case, that the "well pleaded complaint" rule was a crucial turning point and that precisely the same jurisdictional issue was presented in that case as in the Oneida case. For instance, the Indians in Skokomish were not in possession of the disputed lands. It should not be presumed that the Ninth Circuit and the counsel for the parties, including the United States as party defendant, were unaware of the "well pleaded complaint" rule.

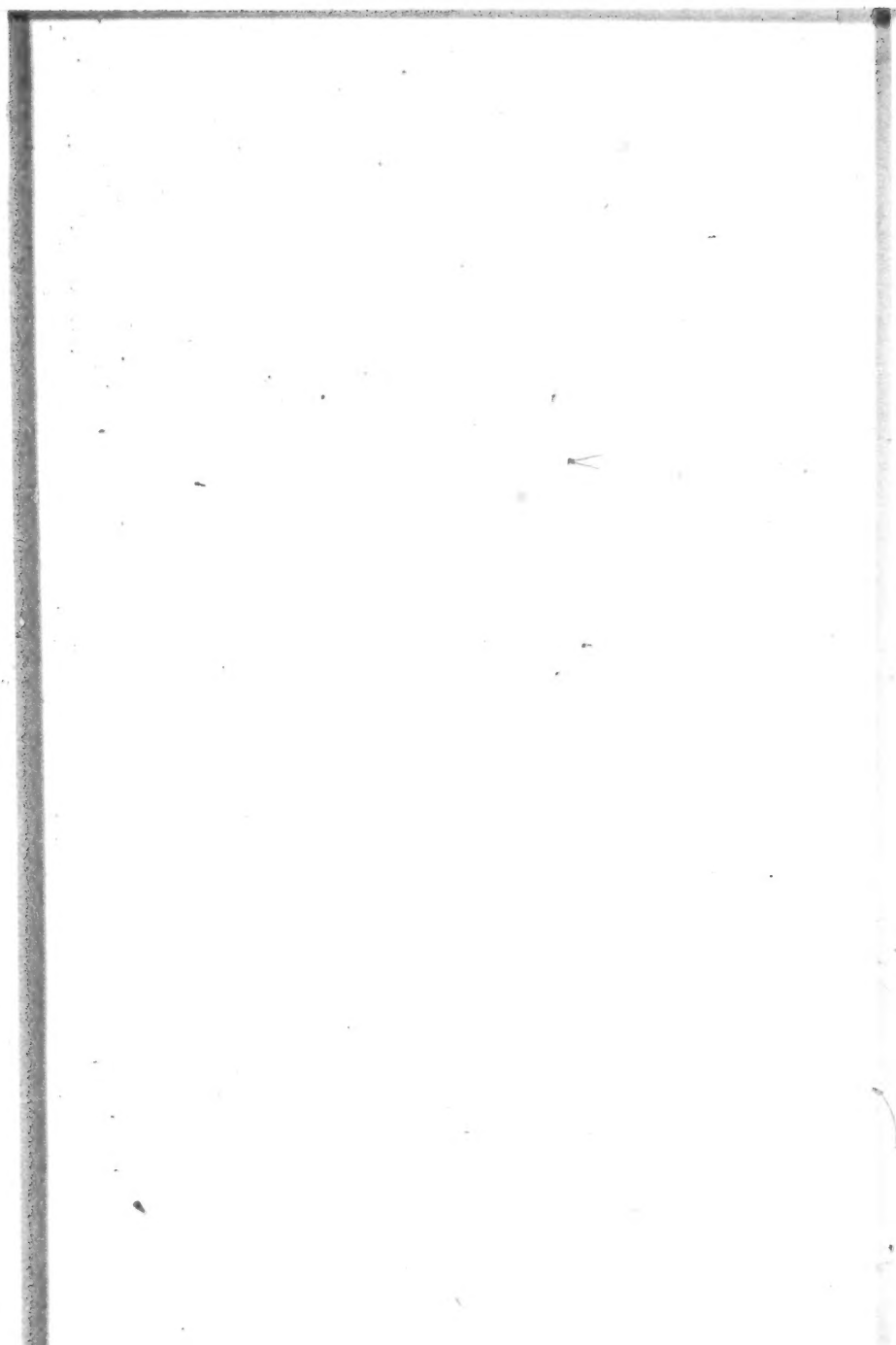
CONCLUSION

The Memorandum for the United States states that the view of the Solicitor General is not shared by all government lawyers and includes part of a letter from the Acting Solicitor of the Department of Interior written to state his "reasons why we think the United States should recommend that certiorari be granted." This confirms that a significant jurisdictional question is involved here.

This case involves the present ability of Indian tribes throughout the United States to protect their land rights and to recover land unlawfully taken from them. Certiorari should be granted.

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May 18, 1973.



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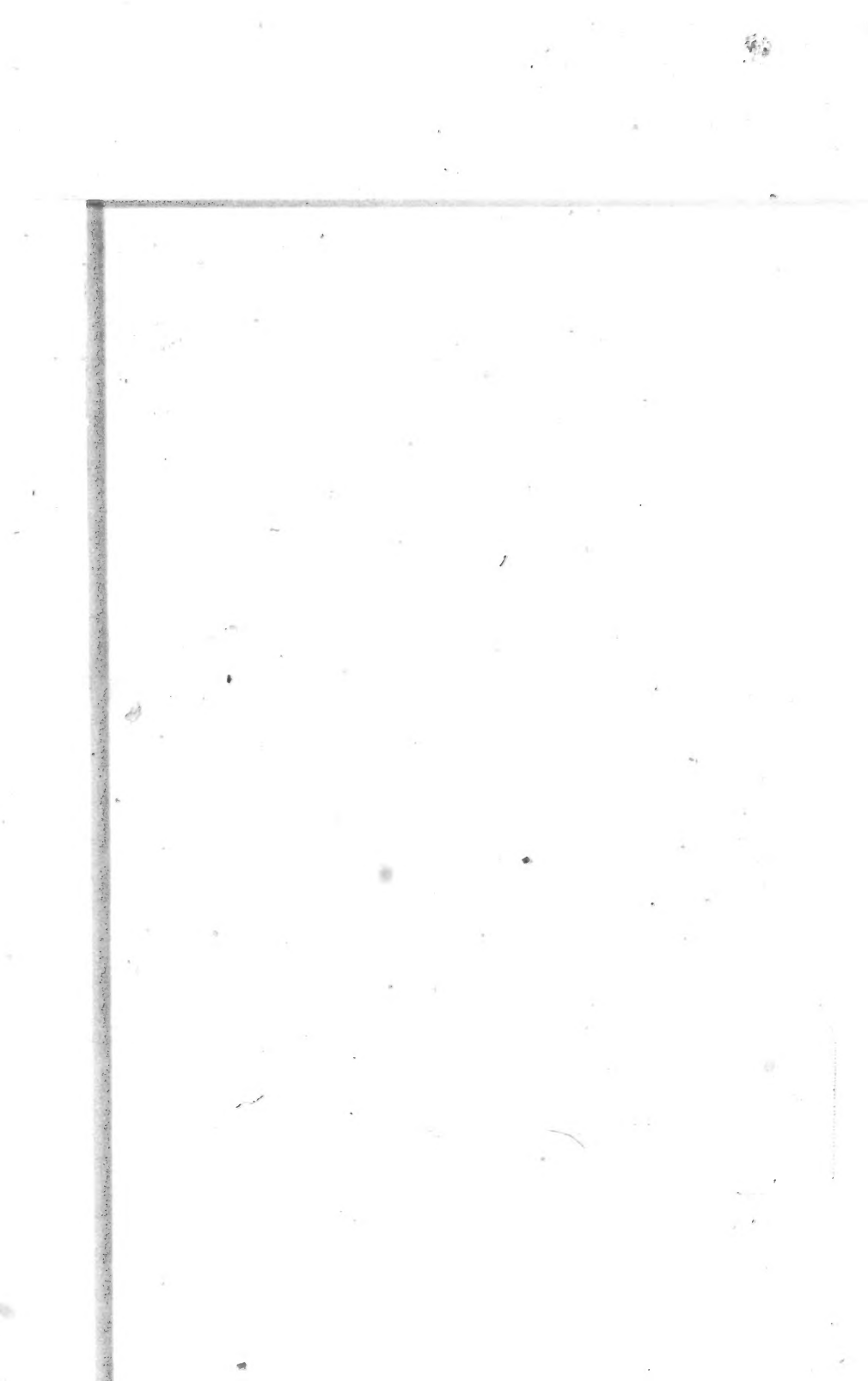


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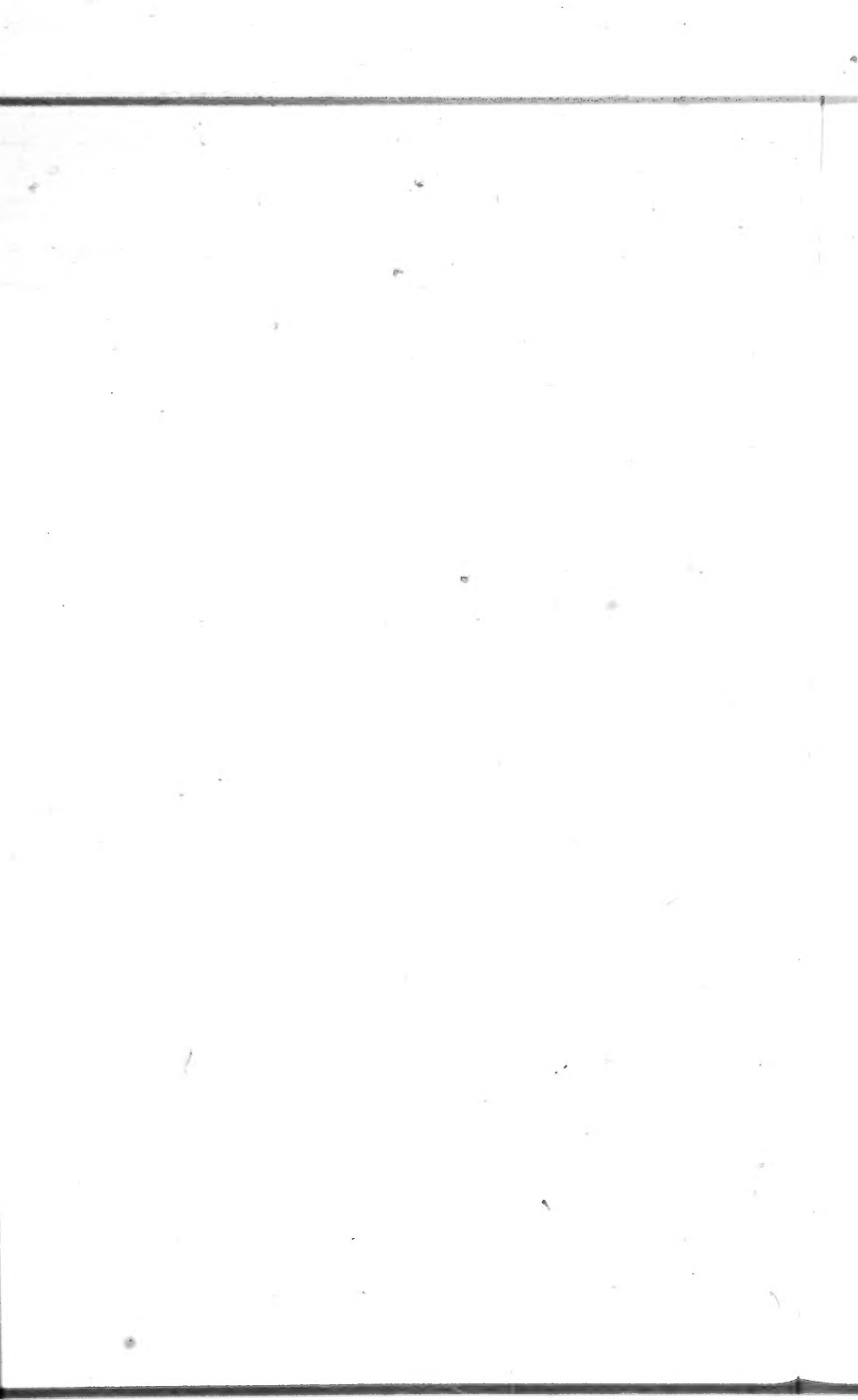
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IN THE
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v.

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Respondents.

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals appears in the petition, Appendix pp. 14-29, and is reported at 464 F. 2d 916.

JURISDICTION

The judgment of the Court of Appeals was entered on July 12, 1972, and motion for rehearing was denied on September 11, 1972. The petition was filed on December 9, 1972 and was granted on June 4, 1973. The jurisdiction of this Court rests on 28 USC 1254(1).

QUESTIONS PRESENTED

1. Whether the federal court has jurisdiction of this suit as arising under the Constitution, laws, or treaties of the United States pursuant to 28 U.S.C. 1331, headed "Federal question; amount in controversy; costs".

2. Whether the federal court has jurisdiction of this claim of the Oneida Indians as arising under the Constitution, laws, or treaties of the United States pursuant to 28 U.S.C. 1362, headed "Indian tribes".

3. In a broader sense, the question presented by this case is whether an Indian tribe can protect its tribal lands where: (a) the federal authorities refuse to help and (b) the Indian tribe is denied access to state courts.

STATUTES INVOLVED

Federal

25 USC 175

§ 175. United States attorneys to represent Indians

In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity. Mar. 3, 1893, c.209, § 1,27 Stat.631; June 25, 1948, c.646, § 1,62 Stat.909.

25 USC 177

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of

the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. R.S. §2116.

25 USC 233

§233. Jurisdiction of New York State courts in civil actions

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: ... Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: And provided further, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: Provided further, *That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.* Sept. 13, 1950, c.845, § 1.64 Stat. 845. [Emphasis added.]

28 USC 1331

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 USC 1362

§ 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. Added Pub.L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.

EXCERPTS FROM FEDERAL TREATIES INVOLVED

Treaty with Six Nations — Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured and confirmed in the possession of lands on which they are settled."

Treaty with Six Nations — Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations — Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

*Treaty with Oneida, Tuscarora and Stockbridge Indians —
Oneida 1794*

"Whereas, In the late war between Great Britain and the United States of America, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

**STATEMENT OF FEDERAL POLICY
BY PRESIDENT GEORGE WASHINGTON
TO NEW YORK INDIANS 1790**

"I the President of the United States, by my own mouth, and by a written speech signed with my own hand, and sealed with the seal of the United States, speak to the Seneca nation, and that they would keep this speech in remembrance of the friendship of the United States.

"I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the United States was established, when the Separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.

"Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Hear well, and let it be heard by every person in your nation, that the President of the United States declares, that

the General Government considers itself bound to protect you in all the lands secured to you by the treaty of fort Stanwix, the 22d of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of you. You complain that John Livingston and Oliver Phelps, assisted by Mr. Street, of Niagara, have obtained your lands, and that they have not complied with their agreement. It appears, upon inquiry of the Governor of New York, that John Livingston was not legally authorized to treat with you, and that every thing that he did with you has been declared null and void, so that you may rest easy on that account. But it does not appear, from any proofs yet in possession of Government, that Oliver Phelps has defrauded you.

"If, however, you have any just cause of complaint against him, and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons. But your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell, your lands; that, therefore, the sale of your lands, in future, will depend entirely upon yourselves. But that, when you find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you may make.

* * * * *

"That besides the before mentioned security for your land, you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians. For the particular meaning of this law, I refer you to the explanation given thereof by Colonel Timothy Pickering, at Tioga, which, with the law, are herewith delivered to you." 1/ (Emphasis added)

1/ American State Papers (Indian Affairs, Vol 1, 1832), p. 142. From a statement made by President George Washington to a delegation of New York Indians in 1790. Colonel Pickering's explanation at Tioga, to which the President referred, mentioned previous frauds practiced by "some white men", and then said: "Now, Brothers, to prevent these great evils in future, the Congress declare That no sale of lands made by any Indians, to any person or persons, or even to any state, shall be valid (or of force) unless the same be

[footnote continued]

STATEMENT OF FACTS

The Oneida Indian Nation of New York and The Oneida Indian Nation of Wisconsin brought this suit against the Counties of Oneida and Madison, located in the State of New York.

Plaintiffs contend that the respondents occupy lands which the State of New York obtained in 1795 in violation of the Indian Non-Intercourse Act, 1 Stat. 137 (1790), later Rev. Stat. §2116, and now 25 U.S.C. §177. The 1790 Act provided, *inter alia*:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Prior to the contested cession in 1795, the Plaintiffs had a Reservation in Upstate New York. In 1795, representatives of the State of New York negotiated a "treaty" with the Plaintiffs whereby the Plaintiffs ceded a portion of their land, for what the complaint alleges was unfair and inadequate consideration. This 1795 "treaty" was obtained without federal consent and was never ratified in any way by the United States, and, consequently, was in violation of the above cited Indian Non-Intercourse Act and the treaties invoked in the complaint. 2/

1. [continued]

made at some public treaty held under the authority of the United States. For at such public treaty *wise and good men* will be appointed by the President to attend, *to prevent all deception and fraud*. These Wise & Good men will examine every deed before it is signed and sealed, *and see that every lease or purchase of the Indians be openly and fairly made*" (emphasis added). See Op. of Court of Claims in *Seneca Nation of Indians v. United States*, Ind. Cl. Com. Docket #342-A, 368-A. (Ct. Cl., Dec. 17, 1965), from which Pickering quote is taken.

2/ Pursuant to their treaties, the Oneida Indians have petitioned for relief herein to both the President of the U.S. (1968) and the Governor of NY (1967); both petitions were denied.

Plaintiffs in this suit claim damages for the respondents' occupancy of the Plaintiffs' land for the period January 1, 1968 to December 31, 1969. The fair rental value of such premises for this period amount to at least \$10,000 exclusive of interest and costs.

In the United States District Court for the Northern District of New York, petitioners asserted jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1362 and other sections of 28 U.S.C.

The District Court dismissed the complaint for lack of jurisdiction and held that the case should properly be tried in New York State Courts. In affirming, the Court of Appeals reasoned that the Plaintiffs' complaint was an action "basically in ejectment" and therefore a well-pleaded complaint need not contain allegations of the Oneidas' source of asserted title to the contested property. Consequently, held the Court, the action did not "arise under" the Constitution, laws, or treaties of the United States (28 U.S.C. §1331), even though the Plaintiffs' assertion of title in their complaint is founded on federal statutes and treaties. The Court of Appeals concluded that the "arising under" language of §1362 should be interpreted similarly to the "arising under" language of §1331, and hence under §1362 there was likewise no federal question.

Judge Lumbard dissented, suggesting that the "arising under" language of §1362, passed into law in 1966, should not necessarily be interpreted as the same language in §1331. Judge Lumbard also noted that since the case would turn exclusively on interpretation of federal law and federal treaties, this case "should be considered to arise under the laws, as well as the treaties of the United States."

SUMMARY OF ARGUMENT

Jurisdiction is claimed under two statutes, 28 U.S.C. 1331 and 28 U.S.C. 1362.

28 U.S.C. 1331

With respect to Section 1331, the case arises under the treaties and laws of the United States in the classic sense. The Second Circuit in our case and in *Deere v. St Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929), did not recognize the distinction between *Taylor v. Anderson*, 234 U.S. 74 (1914), and cases arising in New York; namely, that the courts of New York may not hear this case, whereas the state court in *Taylor* did have jurisdiction. In another Second Circuit case, *Tuscarora Nations of Indians v. New York Power Authority*, 257 F.2d 885 (2d Cir. 1958), *vacated as moot sub nom. McMorran v. Tuscarora Nation of Indians*, 362 U.S. 608 (1960), *modifying* 164 F. Supp. 107 (W.D.N.Y. 1958), the lack of a state court forum was a factor in the court's assuming jurisdiction.

In Indian land cases, "possession" or the presumed lack of it should not be controlling where U.S. laws and treaties guarantee such possession to the Indians. Prior decisions of the Second and Ninth Circuits assuming jurisdiction in land cases are analyzed to demonstrate that possession has not uniformly been used as the sole criterion of whether a case "arises under" the treaties and laws of the United States.

In the view of the majority of the Second Circuit, the treaties' guaranty of possession would be self-cancelling: If the Oneidas do not have the possession which treaties guarantee, they may not have a federal forum in which to assert their rights to the guaranteed possession. This is not a tenable use of the "arising under" test.

28 U.S.C. 1362

Jurisdiction is also claimed under the broader scope of Section 1362. See dissent of Judge Lumbard in the Court below. Legislative history shows clearly that 28 U.S.C. 1362 was enacted to cover cases, like the Oneidas' case, where the United States Attorney General refuses to act under 25 U.S.C. 175.

Congress intended 1362 to be a remedial "Indian" statute, rather than just a limited exception of the \$10,000 jurisdictional amount rule. It used "arising under the Constitution, laws or treaties of the United States" in the constitutional grant sense, rather than with the more restrictive meaning that has developed for 28 U.S.C. 1331. The examples given to Congress by Senator Burdick, who introduced the bill, and in the Committee Reports have no relation to the "arising under" rule as interpreted by the Second Circuit in our case and in the *Deere* case, 32 F.2d 550 (2d Cir. 1929). The Ninth Circuit in May 1973 decided the same issue contra to the Second Circuit and in favor of jurisdiction under 28 U.S.C. 1362. See Exhibit B of this brief.

This case has a broad policy impact on American Indians, who are precluded by federal law from commencing land cases in courts of many states. 25 U.S.C. 233, 28 U.S.C. 1360. As recognized by the drafters of 28 U.S.C. 1362, there are many instances where the United States Attorney may not or will not act to protect Indian lands. If the decision below stands, an Indian tribe in such case, once ousted from possession, will have no legal forum to assert its rights.

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ARGUMENT

I.

THE OVERRIDING LEGAL PREMISE FOR JURISDICTION IS THAT THE UNITED STATES GOVERNMENT, NO LESS THAN ANY INDIVIDUAL CITIZEN, MUST OBEY ITS OWN TREATIES, LAWS, AND PROMISES.

The cases under 28 U.S.C. 1331 and the legislative history of 1362 should be considered with the above premise in mind. The dignity of the treaties herein involved is exemplified in the opinion of this Court in *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99, 121-25 (1960) especially footnote 18 at 121-22.

In the *Tuscarora* case, the Supreme Court held that the taking of land for a reservoir:

"...did not breach the faith of the United States, or any treaty or other contractual agreement...in respect to these lands for the *conclusive reason that there is none.*" *Id.* at 124 (emphasis added).

In other words, no treaty or agreement concerning the lands near Niagara Falls taken from the Tuscaroras was before the Court. Footnote 18, *Id.* at 121-22 held that the treaty invoked by the Tuscaroras referred only to "...lands in central New York about 200 miles east of the lands in question..." These lands "200 miles east" are the very Reservation lands involved in the Oneidas' case.

In the Oneidas' case, now before this Court, there are *three treaties* promising the Oneidas "possession" of their Reservation.

Therefore, the failure of the United States to take action with respect to the Oneidas' Reservation would constitute a breach of treaties and laws of the United States.

II.

THE ONEIDA INDIANS DO NOT HERE SEEK DRASTIC REMEDIES, SUCH AS EJECTMENT, BUT ONLY AN EQUITABLE RECOGNITION OF THE CURRENT VALUE OF THEIR LOST RESERVATION.

The complaint asks, in effect, for an equitable accounting for the value of the Oneidas' interest in their Reservation. This action is not one in ejectment, as the Second Circuit concluded. The relief demanded in the complaint was modeled on the remedy ordered by the Second Circuit Court of Appeals in *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694 (1942). (The City of Salamanca, N.Y. was ordered to pay a modest ground rent to the Senecas.)

III.

THE ONEIDA INDIANS DO NOT HAVE ACCESS TO THE COURTS OF NEW YORK STATE.

A. NEW YORK LAW HAS BARRED INDIAN TRIBES FROM STATE COURTS.

Even in the days when New York courts did not recognize federal supremacy in Indian land matters, the courts of New York barred Indian claims from being heard therein. This is a basic element of the fairness of the Oneida Indians' cause.

It is the law in New York that an Indian Tribe is not a person or entity capable of initiating a lawsuit. This is demonstrated by the fact that under Section 8 of the New York Indian Law, the responsibility of protecting tribal lands rested with the County Judge and not with the tribe as plaintiff. 3/

3/ See discussion of Section 11-A of the New York Indian Law below.

A tribe cannot sue or be sued in New York except where authority has been conferred by statute. Likewise, a suit cannot be brought by an individual in the name of the tribe in the absence of statutory authority, or by a portion of the tribe separated therefrom.

In *Strong v. Waterman*, 11 Paige 607 (1845), the chancellor of the State of New York, was asked to review an injunction granted to the Indians of the Seneca Nation against trespasses on their lands. The court found no common law or statutory basis for jurisdiction but permitted the injunction to stand since the Indians had rights but no remedies.

However, the Court of Appeals of New York has specifically overruled this decision, thus denying Indians access to New York courts in land cases. In *Johnson v. Long Island Railroad Co.*, 162 N.Y. 462, 56 N.E. 992 (1900), the court discussed *Strong v. Waterman* and overruled it holding that neither an Indian tribe, an individual Indian or a group of Indians with similar causes of action have access to the courts of New York without specific legislation:

"As already intimated, we do not regard *Strong v. Waterman* (supra) as authorizing this action.

A decision holding that this action could be maintained either by the tribe, or an individual member thereof, on behalf of himself and all others who should come in and contribute, would be contrary to the policy and practice which have been long established in our treatment of the Indian tribes. They are regarded as the wards of the state, and generally speaking, possessed of only such rights to appear and litigate in courts of justice as are conferred upon them by statute.

It is conceded by the complaint in this action 'that the tribe have no legal capacity to sue therefor and have no corporate name by which they can institute such a suit.'

The theory of an action by one for the benefit of all is, that where a large number of persons, not incorporated, are vested with a cause of action, it may be enforced in that manner, but when it is admitted, as in this case, that the tribe has no cause of action, it follows, logically, that no one member of the tribe could sue for the benefit of all, as the cause of action does not exist.

We are of opinion, however, that the Montauk Tribe of Indians are not without legal redress in the premises, as by an application to the legislature an enabling act can be obtained allowing action to be brought on behalf of the tribe, in the name of its chief or head, or in the name of such member or members thereof as may be selected." *Id.* at 466-67.

The Court's reasoning seems circular but the legal effect continued: Indian land actions like the Montauks' were barred from New York State Courts, until state enabling legislation could be passed.

As it happened, the Montauks *did* obtain an enabling act in 1906 and the case again went to the Court of Appeals, *Pharoah v. Benson*, 164 App. Div. 51, 149 N.Y.S. 438, *aff'd.*, 222 N.Y. 665, 118 N.E. 1079 (1918), which confirmed the *Johnson* rule:

"In the absence of express statutory authority therefore, no action will lie in the courts of this state in the name of any tribe of Indians, nor in the name of any Indian a member of such tribe suing in behalf of himself and all others similarly situated." *Id.* at 52.

The New York Court then utilized a second line of defense and held that the Montauk Indians were not an Indian tribe under the enabling statute, and therefore had no right to sue.

A more recent declaration of this rule is found in *Andrews v. State*, 192 Misc. 429, 79 N.Y.S. 2d 479 (Ct. Cl. 1948), *aff'd.*, 276 App. Div. 814, 93 N.Y.S. 2d 705 (1949):

"The general rule seems to be that a tribe cannot sue or be sued in this state, except where authority has been conferred by statute...Likewise, a suit cannot be brought by an individual in the name of the tribe in the absence of statutory authority...or by a portion of the tribe separated therefrom." *Id.* at 485.

In the case of *St. Regis Tribe v. State*, 4 Misc. 2d 110, 158 N.Y.S. 2d 540 (Ct. Cl. 1956), *rev'd on other grounds*, 5 App. Div. 2d 117, 168 N.Y.S. 2d 894 (1957), *aff'd.*, 5 N.Y. 2d 152 N.E. 2d 411, 177 N.Y.S. 2d 289 (1958), *cert. denied*, 359 U.S. 910 (1959), the State in a Court of Claims action contended that the

Tribe lacked legal status to sue. In his affidavit in support of the State's motion to dismiss, Assistant Attorney General, Donald C. Glenn, deposed and said:

"3. Relating to capacity to sue:

Assuming, but not conceding, that the American St. Regis Tribe of Indians had any independent interest in Barnhart's Island, which was appropriated by the State of New York, such interest belonged to the Tribe collectively. *In the absence of specific statutory authority, an Indian Tribe does not have capacity to sue since it is not a recognized legal entity.* Similarly, an action involving tribal property cannot be maintained by the Chiefs or members of the Tribe, suing in their individual capacity and also for the benefit of all other tribal members, because the interest is tribal, not individual. *Only the Legislature may permit bringing of a suit pertaining to a tribal interest in real property;* but neither the general provisions of the Indian Law, nor Article eight thereof which specifically deals with the St. Regis Tribe, authorize claimants to prosecute the instant claim.

Since there is no enabling act which would allow this suit, claimants lack legal capacity to sue and the claim must be dismissed." (Emphasis added.)

[From *Record on Appeal to N.Y. Court of Appeals, St. Regis Tribe, etc., v. State of New York*, at 31-32.]

The St. Regis Indians did not dispute this point as a general rule, but claimed specific statutory permission. The Court of Claims held that such specific permission *did* exist in the *St. Regis* case:

"The — [State's] — motion must be and hereby is denied on this particular ground. We limit our decision specifically to the cited and quoted statutes as they authorize or may authorize the exercise of the right of eminent domain. *St. Regis Tribe v. State*, 4 Misc. 2d 110, 117, 158 N.Y.S. 2d 540, 549 (Ct. Cl. 1956).

In effect, the *St. Regis* case confirmed the long-standing rule that an Indian Tribe, as such, cannot sue in New York courts.

The New York legislature in 1958 added the following to the Indian Law:

§ 11-a. Recovering possession of reservation land.

In addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band of Indians may in the name and on behalf of such nation, tribe or band, maintain any action or proceeding to recover the possession lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation. Added L. 1958, c. 400, eff. April 7, 1958." N.Y. Indian Law § 11A (McKinney Supp. 1972).

This statute and 25 USC §33 (discussed below) must be construed together. The result must be that Indian land cases which "relate to transactions or events transpiring prior to September 13, 1952" are foreclosed from the jurisdiction of New York Courts since that jurisdiction was not granted to New York State by Congress.

B. FEDERAL LAW HAS BARRED INDIAN LAND CLAIMS FROM NEW YORK STATE COURTS.

Since the challenged transaction occurred in 1795, the New York State courts are barred from entertaining claims of the Oneida tribes by the Fifth proviso to 25 U.S.C. 233:

"Provided further, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1953."

Despite the clear statutory bar to the jurisdiction of the New York State courts over the land claims of the Oneida tribes, the United States has argued in Footnote 3 of its amicus curiae memorandum that New York courts may have jurisdiction here apart from 25 U.S.C. Section 233.

The United States has ignored this Court's decisions, discussed in detail in *Williams v. Lee*, 258 U.S. 217 (1959) and the legislative history of 25 U.S.C. §233. *Williams v. Lee*, supra, affirmed the long-standing principle of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1932) that state courts are without jurisdiction over Indian affairs. While recognizing that there have been some

judicial modifications to the rule of *Worcester v. Georgia*, this Court stated at page 221 of its *Williams* opinion:

"Significantly, when Congress has wished the states to exercise this power [civil and criminal jurisdiction] it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied."

Therefore, the New York courts have no jurisdiction apart from the section 233 unless specifically granted by Congress. Research has not disclosed any Congressional or judicial grant of jurisdiction to the New York courts over Indian land claims arising out or pre-1953 events. The issue is not an open question for the state courts.

The fifth proviso in Sec. 233, as quoted above was not in the bill (S. 192) as originally introduced in Congress. It was added at the request of certain New York Indians. See Congressional Record—House for July 27, 1950, page 11400. The explanation given by Congressman Morris therein shows clearly that Congress assumed that Indian land claims arising before September 13, 1952 could be heard in federal courts. See following excerpt:

"These amendments will preserve those -(treaty)- rights. Then in addition thereto they will preserve their right to go into the United States courts in regard to claims that they might have growing out of any transactions in regard to land dealings and so forth, with the State of New York. In other words, Mr. Speaker, I believe that these particular amendments are such that there can be no real objection now."

The Congressional Record—House for August 14, 1950, at page 12664, contains further explanation:

"In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision."

Rep. Morris also stated

"This just [the Fifth proviso] assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great state of New York in regard to their lands."

In expressly denying jurisdiction to the New York State courts over Indian land claims arising out of pre-1953 events, Representative Morris and Congress seemed to have the instant situation in mind. Although New York State is not a party defendant, it is indirectly involved in this litigation. To avoid any conflict, apparent or real, Congress deprived the courts of New York of jurisdiction in civil actions involving Indian lands or claims relating to events occurring before 1953. 4/

IV.

BECAUSE OF THE THREE TREATIES INVOKED THEREIN, THE COMPLAINT STATES A CAUSE OF ACTION ARISING UNDER THE LAWS OF THE UNITED STATES WITHIN THE MEANING OF 28 U.S.C. 1331.

A. PREAMBLE

This section of the Oneidas' brief will analyze the law under 28 U.S.C. 1331 as applied to the particular facts before the Court. Initially, the analysis shows that the three treaties, in and of themselves, bring this case under 1331. Next, the concept of "possession", which the majority opinion below thought crucial, is examined in the light of prior decisions of the Second and Ninth Circuits. Finally, the point is made that this is not an action in ejectment, but rather a plea for equity and justice in form which will leave undisturbed the occupancy of the persons presently residing on the Oneidas' Reservation.

4/ The Court of Appeals, 464 F. 2d 916 (1972) in Footnote 9 of its opinion assumed that the New York courts would not have jurisdiction over the claim of the Oneida tribes. See also "Federal Indian Law" 363-64.

B. THIS CASE "ARISES UNDER" THE THREE TREATIES INVOKED IN THE COMPLAINT

To the majority of the Court below, the fact that the Oneida Indians are not in possession of their Reservation is fatal to federal jurisdiction. It distinguished the *Tuscarora*, 257 F.2d 885 (2d Cir. 1958), case on the basis that there the Indians were in possession of their land and stated that, because the Oneidas were not in possession:

"...on the rather technical view taken by the Supreme Court, their action does not 'arise' thereunder." (Meaning under the laws, etc. of the United States.) Petition, p. 21.

We believe the Second Circuit's distinction on the basis of possession to be untenable because the very treaties under which the Oneidas are suing and invoke in their complaint promise them "possession" of the land in question:

"The Oneida and Tuscarora Nations shall be secured in the *possession* of lands on which they are settled." (Emphasis added; Treaty of 1784.)

"The Oneida and Tuscarora Nations are also *again secured and confirmed* in the *possession* of their respective lands." (Emphasis added; Treaty of 1789)

"...the said reservation *shall remain theirs* until they choose to sell the same to the people of the United States..." (Emphasis added; Treaty of 1794)

"No purchase, grant, lease, or other conveyance of lands...*shall be of any validity in law or equity*..." (Emphasis added; 25 U.S.C. 177)

"...The General Government will never consent to your being defrauded, but it will protect you in your just rights..." (Promise of George Washington)

"...the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself *from the fact of previous possession* or ownership." (Emphasis added; 25 U.S.C. 194)

Since all of the foregoing were quoted and invoked in the Oneidas' complaint, the cause of action is not one of ejectment but rather a special one created by the treaties and laws and promises of the United States.

Whatever policies existed, or may exist, requiring the "ejectment" rule are not applicable to the factual situation presented in this case. The United States has refused to honor its statutory duty, to represent the interest of the Oneidas and the Oneidas have been and are now barred from state courts. 5/

Under these facts in a suit under a federal treaty guaranteeing "possession", the fact of non-possession should not bar the recipient of the guaranty from federal court.

C. THE USE OF POSSESSION VS. NON-POSSESSION AS THE SOLE CRITERION OF FEDERAL JURISDICTION IS NOT IN ACCORD WITH OTHER DECISIONS OF THE SECOND AND NINTH CIRCUIT COURTS OF APPEAL.

In two prior cases, Circuit Courts of Appeal have held that Indian tribes *not in possession* of the disputed land could protect their rights in federal court. The first such case was *Tuscarora Nation of Indians v. New York Power Authority*, 257 F. 2d 885 (2 Cir. 1958). As shown in the opinion of the District Court, which raised the jurisdictional issue and then assumed jurisdiction, the Superintendent of Public Works of New York State was authorized to "obtain possession according to the procedure provided by Section thirty of the highway law..." *Tuscarora Nation of Indians v. New York Power Authority*, 164 F. Supp. 107, 109 (W.D.N.Y. 1958). In April 15, 1958, the Power Authority did take over the right to possession of the land in question by filing a condemnation map under Section 30 of the State Highway Law. See Opinion of Second Circuit 257 F. 2d 887, 888. As alleged in paragraph 9 of the *Tuscarora*

5/ 25 U.S.C. 195. The Oneidas have requested the help of the U.S. Attorney in the basic issue, and also on appeal to the Second Circuit on the sole issue of jurisdiction. In each case the help was denied because of an alleged conflict of interest in a case the Oneidas have before the Indian Claims Commission relating to the same "treaties" with New York State.

complaint, dated April 18, 1958, the power authority asserted its right to possession under Section 30 and attempted to enter the Tuscaroras' property. 6/

The other relevant "possession" case is *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959). In that case the Indians claimed certain tidelands located adjacent to their acknowledged reservation. In 1889 the State of Washington asserted ownership of the tidelands, adversely to the Indians, and granted and leased them to the non-Indian predecessors of the defendants in the action. The Indians *were not in possession* of the lands claimed at the time of commencement of the action.

The defendants there raised the same jurisdictional issues as did the defendants in our case. The Ninth Circuit held that there was jurisdiction under 28 U.S.C.A. 1331, because interpretation of the treaty was the crux of the case. It did not find controlling the fact that the Indians were not in possession. (Ultimately the Indians lost because the Court, having taken jurisdiction, held that the legal description of the reservation did not cover the disputed tidelands.)

The main factual difference between the *Skokomish*, *Tuscarora*, and *Oneida* cases is the fraction of the original land currently possessed as compared to the fraction possessed by the defendant. The difference is one of degree, not of kind.

D. TAYLOR V. ANDERSON, 234 U.S. 74, DISTINGUISHED

Both the majority opinion below and counsel for defendants have cited the decision in *Taylor v. Anderson*, 234 U.S. 74 (1914), as controlling here. The Second Circuit also relied on *Taylor* in its decision in *Deere v. St. Lawrence River Power Co.*, 32 F.2d

6/ According to Edmund Wilson's "Apologies To The Iroquois", the state's engineers and work crews had already moved onto the land and several Indians were arrested for trying to oust them and to prevent further entry.

550 (2d Cir. 1929). The *Taylor* case is unlike the *Oneidas'* case in that the plaintiffs in *Taylor* had an available remedy in the courts of the State of Oklahoma. The Oklahoma District Court, *Taylor v. Anderson*, 197 F.Supp. 383, 388 (E.D. Okla. 1911) pointed out:

"[3] Should the plaintiffs hereafter commence this action in the proper state court, and the defendants there set up in their answer the defense which the plaintiffs anticipate, then a federal question will be presented which the state court in the first instance has jurisdiction to determine. If the decision of the trial court on this federal question be adverse to the plaintiffs, they may appeal to the Supreme Court of the state. If the decision of that court on that question be again adverse the plaintiffs, they may appeal to the Supreme Court of the United States and thus finally have the question decided by a federal court."

and the Supreme Court referred to this alternative in saying:

"Whether or not in other respects the plaintiffs overlooked an authorized mode of securing relief to which they may be entitled need not now be considered." 34 S. Ct. 725.

In *Taylor* the plaintiffs were individuals bringing an avowed ejectment action to regain possession of land allotted to an Indian predecessor in title, and the federal district court assumed that the plaintiffs as individual Indians could sue in the courts of the State of Oklahoma (as distinguished from New York where they may not).

SUMMARY: 28 U.S.C. 1131

Under the facts here, the District Court does have jurisdiction under 28 U.S.C. 1131.

The Second Circuit's use of the "arising under" test as applied to ejectment cases would be appropriate in the great majority of real property cases. As pointed out in *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912), much of the land in the United States has its source in a federal grant and federal courts might have been engulfed in land litigation if every ejectment or other land case had original jurisdiction in federal court. A more appropriate procedure in most cases, as the District Court pointed out in

Taylor v. Anderson, is to initiate the suit in state court and then pursue a federal appeal if federal law not applied by state court. This procedure is not, however, available to the Oneidas.

The Oneida Indians' case, as shown by the complaint as amended, is vitally different from *Taylor* and the many "arising under" cases cited by the Second Circuit and by opposing counsel:

First, the Oneidas are now and always have been forbidden by federal law to bring their case in the courts of New York State. The alternate procedure available to the plaintiffs in *Taylor v. Anderson* is not and never has been available to the Oneidas.

Second, until 1958 an Indian tribe was not considered a person competent to bring an action in New York State courts; thus these courts have always been closed to the Oneidas under *state* law as well as federal. By the time Section 11-A of the New York Indian Law had been passed, Congress had enacted 25 U.S.C. 233 which specifically reserved to federal courts actions accruing before September 13, 1952.

Third, the United States has guaranteed to the Oneidas the "possession" of their Reservation. Following proper petition by the Oneidas, both the Executive and Legislative branches of the United States Government have failed to keep the word of the United States because of an alleged "conflict of interest". Thus the courts of the United States are the only avenue by which the Oneidas can pursue justice and have their day in court.

Fourth, this is *not* an ejectment action, nor one whose essential allegation is a right to possession. It is an appeal to the equitable jurisdiction of federal courts based on a very singular factual and legal situation.

Fifth, based on the decisions in the *Tuscarora* and *Skokomish* cases, "possession" in the sense of complete dominion and control is not the key to federal court. In neither of these cases

did the Indians have, under state law, a right of possession of the property involved.

V.

APART FROM THE SPECIAL FACTS WHICH BRING THIS CASE UNDER 25 U.S.C. 1331, THE BROADER JURISDICTIONAL CONCEPT OF 25 U.S.C. 1362 ALSO APPLIES.

A. THE WORDS "ARISES UNDER THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES" AS USED IN 28 U.S.C. 1362 NEED NOT HAVE THE SAME RESTRICTIVE MEANING AS UNDER 28 U.S.C. 1331.

When Congress enacted 28 U.S.C. §1362, extending the jurisdiction of the federal district courts to entertain suits brought by federally-recognized Indian tribes on questions arising under the Constitution, laws or treaties of the United States, Congress intended to include in this jurisdictional grant a suit brought by a recognized Tribe involving land of which the Tribe had been dispossessed in violation of federal laws and treaties.

The Court below assumed, without analysis, that Congress, when it enacted 28 U.S.C. §1362 in 1966, intended that the conditioning phrase "where in the matter in controversy arises under the Constitution, laws, or treaties of the United States" (28 U.S.C. §1362) would be subject to the "well pleaded complaint rule", a judicially ingrained interpretation of the similar phrase contained in 28 U.S.C. §1331. Plaintiffs assert that this assumption is belied by the legislative history of 28 U.S.C. §1362. Before addressing the legislative history of 28 U.S.C. §1362, this brief will focus on two preliminary points.

First, although the "arising under" phrases of 28 U.S.C. §§1331 and 1362 closely parallel the provision in Article III, Section 2 of the Constitution delimiting the permissible ambit of

federal court jurisdiction, this Court has recognized that the congressional grant of federal court jurisdiction contained in 28 U.S.C. §1331 is less generous than the jurisdiction authorized by the Constitution and that the "well pleaded complaint rule" is not an interpretation of the constitutional language but rather an interpretation of 28 U.S.C. §1331. *Shoshone Mining Co. v. Rutler*, 170 U.S. 505 (1900); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); see *Osborn v. Bank of United States*, 9 Wheat. 738 (1824); *Louisville & Nashville Ry. Co. v. Mottley*, 211 U.S. 149 (1908). Consequently, the decision below was not constitutionally compelled, and the Constitution would permit this Court's reversal. See *Osborn v. Bank of United States*, 9 Wheat. 738 (1824); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

Second, this Court has recently cautioned that "[w]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed." *District of Columbia v. Carter*, 93 S.Ct. 602, 604 (1973), citing *Puerto Rico v. The Shell Co. (P.R.), Ltd.*, 302 U.S. 253, 258 (1937); see *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 86, 87-88 (1934); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

In *District of Columbia v. Carter*, this Court was reviewing a decision of the United States Court of Appeals for the District of Columbia that the District of Columbia was a "State or Territory" for the purpose of 42 U.S.C. §1983. The Court of Appeals' decision was founded on a Supreme Court holding that "the District of Columbia is included within the phrase 'every State and Territory' as employed in 42 U.S.C. §1982...." *Hurd v. Hodge*, 334 U.S. 24, 31, 92 L. Ed. 1187, 68 S. Ct. 847 (1948)." *District of Columbia v. Carter*, *supra*, at 604. In reversing the decision below, this Court stated:

At first glance, it might seem logical simply to assume, as did the Court of Appeals, that identical words used in two related statutes were intended to have the same effect. Nevertheless, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law..." *Atlantic Cleaners & Dyers v. United States*, *supra*, 286 U.S., at 433, 52 S.Ct., at 609. *District of Columbia v. Carter*, *supra*, at 604.

The relevance of the above language from *District of Columbia v. Carter* to the instant case is readily apparent. The Court below in this case automatically assumed that the "arising under" language of 28 U.S.C. §1361 should be interpreted in exactly the same fashion as the "arising under" language of 28 U.S.C. §1331, and in so doing, the Court below clearly violated this Court's standards as enunciated in *District of Columbia v. Carter*. Furthermore, as we will demonstrate below, "the logic underlying the Court of Appeals' assumption breaks down completely where, as here, 'there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed...with different intent.' [*Atlantic Cleaners & Dyers v. United States*, *supra*, 286 U.S. at 433; 52 S.Ct., at 609.]" *District of Columbia v. Carter*, *supra*, at 604.

B. 28 U.S.C. §1362 WAS INTENDED TO BE A REMEDIAL "INDIAN" STATUTE, EXTENDING FEDERAL JURISDICTION TO LAND CASES LIKE THE INSTANT ONE.

The legislative history of 28 U.S.C. §1362 is replete with references indicating that Congress, by enacting 28 U.S.C. §1362 in 1966, understood that federal courts would have jurisdiction of suits presenting for judicial action the issues raised by the instant suit.

In recommending the enactment of what is now 28 U.S.C. §1362, the Judiciary Committee of the House of Representatives noted that:

"In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that particularly as to this class of cases, it is appropriate that the actions be brought in a U.S. district court." H.R.Rep. No. 2040, 89th Cong., 2d Sess. 3146 (1966).

The Oneida complaint presents exactly the fact pattern which the above language demonstrates was intended by Congress to fall within the ambit of 28 U.S.C. §1362. The Oneidas are suing for lands taken from them allegedly in violation of the Indian Non-Intercourse Act (now 25 U.S.C. §177), by which Congress imposed a restriction against alienation of Indian land throughout the country. Petitioners assert that if the decision of the Court below is affirmed by this Court, the congressional will as expressed in the above quotation will be violated since this case and, indeed, any other case brought by an Indian tribe for lands of which the tribe was dispossessed in violation of the restriction against alienation imposed by the Indian Non-Intercourse Act will not be heard by federal courts.

Furthermore, this same Committee was cognizant that federal courts have jurisdiction over suits brought by the United States as trustee for Indians or Indian tribes (28 U.S.C. §1345), and that, for a variety of reasons, the United States frequently declines to litigate some Indian actions. The Committee stated as a justification for the passage of 28 U.S.C. §1362 that:

The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are

assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues. H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3147 (1966).

This legislative history is again specifically relevant to the instant case. The United States could have instituted this action (see *United States v. Boylan*, 265 F. 165 [2d Cir. 1920]; 25 U.S.C. §175), and, in fact, the Oneidas have requested the assistance of the United States. The request was denied because of an alleged conflict of interest, engendered by the Oneidas' suit against the United States in the Indian Claims Commission. If the Oneida Tribes and other Indian tribes are to be afforded the same right to a federal court forum as would the United States suing on their behalf in a trustee capacity, which was certainly the Congress' intent in enacting 28 U.S.C. §1362, this Court must reverse the decision below.

Other instances of Legislative Intent on §1362 are as follows:

(1) The memorandum of the Solicitor General of the United States on certiorari describes the issue under 25 U.S.C. 1362 as turning on whether 1362 should be construed as a statute involving Indian claims or more narrowly as a statute involving the \$10,000 limit on federal jurisdiction. This is an accurate description of the 1362 issue, and we submit that the legislative history of 1362 discloses that it is to be interpreted as an Indian statute rather than a jurisdictional statute. In addition to the legislative history, it should be pointed out that the official heading of the bill as submitted to Congress reads as follows:

" AN ACT

To amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, *and for other purposes.*"
[Emphasis added.]

Thus removal of the \$10,000 jurisdictional limit was not the sole purpose for if it were, the act would not specify "for other purposes". Further, 1362 was included in the chapter analysis of Chapter 85 of Title 28 with the heading "1362 Indian tribes". This it was officially characterized as an *Indian statute* as distinguished from a jurisdictional limit change.

(2) It should be noted further that the legislation did not take the form of an exception to 1331, eliminating the \$10,000 requirement as to Indians. It was introduced and passed as a separate statute, which as Judge Lumbard of the Second Circuit pointed out can be considered as an entirely new section with meaning independent of 1331. *Romero v. Intl. Terminal Operating Co.*, 358 U.S. 354, 379-380 (1959); *Gully v. First National Bank* 299 U.S. 109, 113 (1936); "The Broken Compass", 115 Penn. Law Rev. 890, 891 (1969).

An examination of the legislative history of 1362 confirms the view of the Acting Solicitor of the Department of Interior as set forth in his letter to the United States Solicitor General, dated March 21, 1973, which states in part:

"We think the legislative history of §1362 clearly shows that it is a statute intended to enable Federally recognized Indian tribes to litigate in the Federal courts all questions pertaining to their rights arising from lands claimed by them. ..." p. 11. 7/

(3) House Report #2040, September 12, 1966, U.S. Code Congr. & Adm. News 1966, pp. 3145-3149, states in its introduction that the purpose of the bill is "to permit Indian tribes to maintain civil actions in federal courts without regard to the \$10,000 limitation and *for other purposes*. ..." *Id.* p. 3145. [Emphasis added.]

7/ Exhibit A of this brief is a reprint of such letter as set forth in the Memorandum of the Solicitor General of the United States to the Supreme Court.

(4) The same House report cites a case similar to the *Oneidas*, where the U.S. Attorney declines to bring an action: "As is observed in the Department of Interior Report, the tribes would then have access to the federal courts through their own attorneys." *Id.* p. 3147. This example is *not* given in the context of the \$10,000 limitation but is, rather, listed as "another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill." *Id.* p. 3147. The next paragraph of the House Report clearly differentiates the cases where the U.S. Attorney refuses to bring the suit from cases where the \$10,000 limitation is applicable.

(5) The House Report contains a letter from Harry R. Anderson, Assistant Secretary of Interior, which refers to lands which are *or were held* by the United States in trust or by a tribe subject to restrictions on alienation, thus indicating that the Indians need not be in possession to sue in Federal Court. *Id.* p. 3148.

(6) The House Report also contains a letter from Ramsey Clark, Deputy Attorney General, setting forth the views of the Department of Justice. He states that "*one of the purposes of this bill...*" is to remove the problem of the \$10,000 limitation. *Id.* p. 3149.

(7) The Senate Report adds certain clarification to the House Report. *S. Rep. No. 1507*, August 24, 1966, states in part:

"...In many instances claims arise under special treaties between the United States and the tribes, but because of the limitation the matter cannot be litigated in Federal courts. As an example, several parcels of land may be claimed by the tribes, each of the parcels being valued at under \$10,000 even though the aggregate constitutes more than \$10,000. However, these claims may not be added together for the purpose of meeting the jurisdictional amount, and the tribes are denied a Federal forum.

"There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal

courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys."

Note that the above language refers to several parcels which "may be *claimed* by the tribes". [Emphasis added.] The floor report on this bill, as reported in Congressional Record-Senate, August 26, 1966, p. 19, 885, contains essentially the same language as quoted above in explanation of the purpose of the bill.

(8) With his Memorandum to the Supreme Court on this case, dated May 1973, the United States Solicitor General lodged with the Court a copy of the Congressional hearings on 28 U.S.C. 1362, held July 15, 1966. At these hearings, Senator Quentin N. Burdick, who sponsored the bill gave several examples of its intended application, which are quoted in part below:

"For example, an Indian tribe claims title to a tract of land on the reservation by reason of a treaty or act of Congress. But the value of the land is less than \$10,000.

"And I might say, Mr. Chairman, that the fraction there is one of the problems we have in Indian tribes, where there is a multiplicity of ownership in small pieces and small fractions.

"So there may be eight or ten of such parcels, each claimed by different owners. Added together the value of the parcels would exceed \$10,000. But the separate value of each parcel cannot be added up to make the \$10,000. As a result, a tribe cannot maintain suit in Federal court to establish its right to substantial land areas even though the matter arises under laws or treaties of the United States." at 4.

* * *

"There are cases where a conflict arises on the question of whether land, or minerals, is public land or minerals of the United States or the trust property of a tribe. The Secretary of the Interior has the responsibility for both kinds of land, on request of a public land applicant, unbeknown to the tribe or even the Bureau of Indian Affairs, the Secretary of the Interior issues a patent to the land. The tribe is prohibited from maintaining suit in Federal court to cancel the patent. Only the United States can do that. But the Attorney General will not bring suit unless asked and the Secretary of the Interior, who issued the patent, could not be expected to ask for cancellation because to do so would in effect admit error on his part originally. The tribe may bring suit against the patentee and ask the court to declare the tribe the owner on the ground that the tribe's title depends on Federal laws or treaties. But here again, unless the land has a value in excess of \$10,000 the Federal district court has no jurisdiction." at 4, 5.

Both the examples given by Senator Burdick are instances where the Indians would not be in possession of the land involved. The second example very specifically refers to the case where the United States has patented alleged Indian land to a third party, who would presumably then be in possession of it. This is very similar to the Oneidas' case except that it was the State of New York and not the United States which patented the Reservation to the predecessors of the defendants herein. 8/

(9) The Congressional hearings referred to above also contain a statement by Attorney Marvin J. Sonosky, at 12-15, to the Congressional Committee in part as follows:

"I might add one other point, and I should have put it in my memorandum, that as a general proposition state courts have no jurisdiction over civil matters affecting restricted property, or tribal relations of Indians, unless Congress has specifically conferred such jurisdiction. In many instances, particularly in Oklahoma, Congress has conferred such

8/ A reading of the legislative history of 25 U.S.C. 233 and 28 U.S.C. 1362 clearly shows that Congress, in enacting these sections, had no idea that "arising under" would be given the very restricted meaning adopted by the majority of the Second Circuit.

jurisdiction. Now, this statement can be found in Federal Indian Law at page 363, with supporting citations. Federal Indian Law is a government publication, a Government Printing Office publication, sponsored by the Department of the Interior. It is hard to generalize in these things. But as a general rule this is true. And we feel that Indians, through S. 1336, would be put in at least as good a position as so many of the non-Indians who are permitted to test their rights under Federal laws, treaties and constitutions without regard to the jurisdiction of the court.

Senator Tydings. Thank you very much, Mr. Sonosky. I think you have answered our questions, and any that are left in mind.

I will recommend to the Subcommittee prompt favorable report on this legislation to the full committee." at 14-15.

This statement bears out, not only the general remedial intent of 1362, but also the fact that in the State of Oklahoma where *Taylor v. Anderson* originated, the state courts have jurisdiction over Indian land cases. Compare 25 U.S.C. 233 and 28 U.S.C. 1360.

The Oneidas' view of 1362 and its impact upon federal jurisdiction was adopted by Judge Lumbard of the Second Circuit in his dissenting opinion and also has been adopted by the Ninth Circuit Court of Appeals in the case of *Fort Mojave Tribe v. LaJollette*, No. 71-1967 (9th Cir., May 16, 1973). The opinion in this case is reproduced as Exhibit B to this brief and was called to the attention of the Supreme Court by the Solicitor General of the United States in a supplemental memorandum to the Supreme Court.

A further case upholding the Oneidas' view of the effect of 1362 is the case of *Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.*, No. Civ. 72-376-Phx. (D. Ariz., Dec. 11, 1972), an unreported decision filed in December 1972 after the Oneidas' petition for certiorari was filed. A copy of this decision is reproduced as Exhibit C to this brief.

Two law review articles recently published have also analyzed this case from the viewpoint of 28 U.S.C. 1362. In "*Federal*

Question Jurisdiction in Cases Involving Indian Land", by Gail Alpern. 39 Brooklyn Law Review 880 (1973), the author states:

"Section 1362 of Title 28 of the United States Code (hereinafter referred to as Section 1362) was also enacted to define the unique status of the Indians within the scheme of federal jurisdiction. The legislative history of this statute reveals that it was enacted to do more than merely abrogate the need for civil actions of this kind to meet the required jurisdictional amount. It also provides 'the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys'."

In "*Toward a New System for the Resolution of Indian Resource Claims*", 47 N.Y.U. Law Rev. 1107 (1972), the author analyzed 28 U.S.C. 1362 and concludes as follows:

"Based on this analysis, it is submitted that to determine the scope and purpose of section 1362, one must consider its historical background and the problems its passage sought to remedy. The legislative history of section 1362 indicates that its primary purpose was to remove the amount in controversy requirement in suits brought by Indian tribes; however, the history does not limit the purpose of the act to this alone. In fact, examples of the applicability of the bill given by the Committee reports indicate that Congress expected that certain actions which would be denied jurisdiction under the well-pleaded complaint rule, such as those in ejectment, should be heard in federal courts. Thus, the legislative history may be the basis for giving a broader meaning to the 'arising under' clause of section 1362 than is presently given to the 'arising under' clause of section 1331. Moreover, it is a general rule of construction that statutes applying to Indians, and remedial statutes generally, are to be construed liberally. Therefore, when one considers that the section manifests Congress' concern for its grant of jurisdiction liberally, as was done in the *Salt River* decision, is compelling."

SUMMARY: 28 U.S.C. 1362

Under the legislative history noted above, and following the two Ninth Circuit cases included as Exhibits B and C, it is our conclusion that 28 U.S.C. 1362 was intended to be enacted as a jurisdictional relief statute for Indians and should not be given the strict "arising under" interpretation heretofore used under 28 U.S.C. 1331.

CONCLUSION

This suit is brought under three federal treaties which guarantee to the plaintiffs, the Oneida Indians, the *possession* of the specific land in question. According to the Court below, the lack of such possession precludes federal court jurisdiction; if this be so, then the lack of that which is guaranteed by the treaties also precludes the treaties' implementation.

As the legal principles are applied to our facts by the Court below, the three treaties and 28 U.S.C. 1331 and 1362 cancel each other out. That condition which brings the treaties into play also renders them unenforceable; this is not the intent of the treaties or the laws.

Under the very singular facts before this Court, 25 U.S.C. 1331 and 1362 should be applied in favor of federal court jurisdiction.

Respectfully submitted,

George C. Shattuck
Attorney for Petitioners
c/o Bond, Schoeneck & King
One Lincoln Center
Syracuse, New York 13202

July 18, 1973.

Exhibit A — Excerpt from letter from Acting Solicitor of the Department of Interior to Solicitor General of the United States.

"To us the significance of the *Oneida* case is the interpretation which should be accorded to 28 U.S.C. § 1362. By two-to-one decision, the Second Circuit has concluded that the "well-pleaded complaint rule" developed as a result of interpreting 28 U.S.C. § 1331 must also be applied to § 1362.

We think the legislative history of § 1362 clearly shows that it is a statute intended to enable Federally recognized Indian tribes to litigate in the Federal courts all questions pertaining to their rights arising from lands claimed by them. As both the petitioners and the Native American Rights Fund as *amicus curiae* point out respectively in their petition and brief, unless the Federal courts have jurisdiction of such a claim as presented by the *Oneidas* it may not be litigated since state courts have no jurisdiction to try suits involving rights to Indian lands.

Indicative of the Congress' intent that all Indian land cases may be litigated by Federally recognized Indian tribes in Federal courts pursuant to § 1362 is the following portion of the statement contained in Senate Report No. 1507, 89th Congress, 2nd Session, reporting on S. 1356, which became § 1362. The portion of the statement to which we refer appears on page 2 of Report No. 1507 and reads as follows:

"There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have

Exhibit A — Excerpt from letter from Acting Solicitor of the Department of Interior to Solicitor General of the United States.

had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

"Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

"The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys."

The present case classically illustrates an instance of what the Senate Judiciary Committee had in mind, for the suit is brought by tribal attorneys since the United States, which is defending against an Oneida claim filed pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70 *et seq.* involving aspects of the claim being pursued by the Oneida Nation against Oneida and Madison County, declined to file an action on behalf of the Nation.

I shall appreciate your bringing the foregoing views of the Department of the Interior to the attention of the Court. "

Exhibit B — Opinion.

**IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

No. 71-1967

THE FORT MOJAVE TRIBE

v.

WILLIAM L. LAFOLLETTE ET AL.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

[May 16, 1973]

**Before: HAMLIN, BROWNING AND WRIGHT, Circuit Judges.
WRIGHT, Circuit Judge:**

This is an appeal from an order dismissing an amended complaint on the ground that the United States was an indispensable party to the litigation. The appellant, an Indian tribe acknowledged by the government pursuant to statute [25 U.S.C. §476], brought suit to quiet title as against claims of the defendants to land in Arizona. The complaint did not allege who was in possession but asserted that defendants made some claim adverse to the title of the tribe.

The tribe asserts a superior right under Executive Order No. 1296, February 2, 1911, by which the United States withdrew from settlement certain land in (the territory of) Arizona and set it apart

“as an addition to the present Fort Mojave Indian Reservation . . . , for the use and occupation of the Fort Mojave and such other Indians as the Secretary of the Interior may see fit to settle thereon.”

Exhibit B — Opinion.

Defendants moved to dismiss the action on several grounds, including lack of subject matter jurisdiction and failure to join an indispensable party. The latter ground was the one relied upon by the district court in dismissing without prejudice. It was the view of the trial judge that the Executive Order did not transfer title and no trust patent had been issued to the land in question, leaving title in the government.¹

I.

THE INDISPENSABLE PARTY ISSUE

Without joining the United States, an Indian tribe may sue in its own right to protect its interest in restricted land. *Choctaw & Chickasaw Nations v. Seitz*, 193 F. 2d 456 (10th Cir. 1951). It is of no consequence that no trust patent had been issued for the land involved. See *Skokomish Indian Tribe v. France*, 269 F. 2d 555 (9th Cir. 1959).

As the United States will not be bound by any determination made in a suit to which it is not a party, *United States v. Candelaria*, 271 U.S. 432 (1926),

"It does not appear that failure to join the United States would radically and injuriously affect its interest nor will a final determination be inconsistent with equity and good conscience." *Salt River Pima-*

¹ Defendants urge this court to uphold the order of dismissal on the grounds that the federal court in Arizona was without jurisdiction because the land in question was in California. Plaintiff replies that by virtue of the Interstate Compact Defining Boundary between the States of Arizona and California, approved by Congress August 11, 1966, Stat. , the land is in Arizona. Obviously this is a factual question which should be resolved by the trial court in the first instance.

Exhibit B — Opinion.

Maricopa Indian Community v. Arizona Sand and Rock Co., 353 F. Supp. 1098, 1101 (D. Ariz. 1972).

Our *Skokomish* decision is controlling here, and the order of dismissal was improper.

II.

JURISDICTION OF THE DISTRICT COURT

The appellant Indian tribe's claim of federal jurisdiction is based on 28 U.S.C. §1362.² Defendants argue that §1362 retains the requirements for federal question jurisdiction that have been judicially engrafted onto 28 U.S.C. §1331, and that these have not been met here.

It is doubtful that the requirements of §1331 are met in the present case whether the plaintiff's suit be styled

² 28 U.S.C. §1362 provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

Exhibit C — Memorandum and Order.**"IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

**SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY,**

Plaintiff,

vs.

**ARIZONA SAND AND ROCK COMPANY,
an Arizona corporation; SALT RIVER
VALLEY WATER USERS' ASSOCIATION,
an Arizona corporation, et al.,**

Defendants.

No. Civ 72-376-Phx.

**MEMORANDUM
AND ORDER**

Before the court are motions to dismiss for lack of jurisdiction by Mesa Sand and Rock, Inc., John L. Merrill, Mrs. John L. Merrill, John L. Merrill, Administrator of the Estate of Ira L. Merrill, Sarah Ann Ickes, John Doe Ickes, husband of Sarah Ann Ickes, Gilbert Allen Merrill and Mrs. Gilbert Allen Merrill, Ira Keith Merrill and Mrs. Ira Keith Merrill, and by defendant Arizona State Highway Commission along with a motion to dismiss for failure to state a claim upon which relief may be granted by defendant United States. There is in addition a petition by the plaintiff for an order to show cause why the U. S. Attorney should not be ordered to prosecute suit on behalf of the tribe. Further, the defendants Arizona State Highway Commission have also moved to join the United States as a necessary or indispensable party. The motions of the private and corporate defendants rely upon Shulthis

Exhibit C — Memorandum and Order.

as an action in ejectment³ or one to quiet title.⁴ But we agree with the dissenting opinion of Judge Lumbard in *Oneida Indian Nation of New York State v. County of Oneida*, 464 F. 2d 916, 924 (2d Cir. 1972) that Congress intended by §1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act. *Accord: Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Company, supra*. As so interpreted the statute is clearly constitutional. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

Scholder v. United States, 428 F. 2d 1123, 1125 (9th Cir. 1970), and *Quinault Band of Indians v. Gallagher*, 368 F. 2d 648, 656 (9th Cir. 1966), do not hold otherwise.

Reversed and remanded.

³ The action was designated an action to quiet title but there is no allegation the plaintiff is presently in possession of the lands in controversy. If plaintiff is out of possession, it has an adequate remedy at law in ejectment and an action to quiet title will not lie. *Whitehead v. Shattuck*, 138 U.S. 146 (1891); *Oneida Indian Nation of New York State v. County of Oneida*, 464 F. 2d 916 (2d Cir. 1972); cf. *Roubedaux v. Quaker Oil & Gas Co.*, 23 F. 2d 277 (8th Cir. 1927). But if the plaintiff's proper remedy is an action in ejectment "a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no federal question [under 28 U.S.C. §1331] even when a plaintiff's claim of right or title is founded on a federal statute, patent or treaty [cits omitted]." *Oneida Indian Nation, supra* at 920.

⁴ While an action to quiet title will present a federal question under 28 U.S.C. §1331 if the complaint alleges a substantial controversy between the parties regarding the interpretation or effect of federal law, *Skokomish Indian Tribe v. France*, 269 F. 2d 555 (9th Cir. 1959), the present complaint includes no such allegation.

"[A] controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Shulthis v. McDougall*, 225 U.S. 561 (1912).

Exhibit C — Memorandum and Order.

v. McDougal, 225 U.S. 561 (1911) which held that under the well pleaded complaint rule jurisdiction is insufficient where the only federal ingredient in the suit is that the plaintiff's title was derived from the United States. The United States has moved to dismiss count two of the complaint which asks for a writ of mandamus under 28 U.S.C. 1361, ordering the Department of Justice to prosecute the allegations of trespass levied against the private and corporate defendants in count one of the complaint. For the following reasons the court has determined that this court has jurisdiction, that the complaint states no grounds upon which to issue the writ of mandamus, and further that the United States is not an indispensable party.

Under 25 U.S.C. 175 the United States Attorney has authority to represent Indians in all suits at law and in equity. Under recent 9th Circuit decisions this authority has been held discretionary. Rincon Band of Mission Indians v. Escondido Mut. Wat. Co., 459 F.2d 1082 (1972); United States v. Gila River Pima-Maricopa Indian Community, 391 F.2d (1958) and Siniscal v. United States, 208 F.2d 406 (1953). It is clear that should the United States choose to exercise its discretion it could file suit in this case under 28 U.S.C. 175 and as guardian and trustee for the tribe. United States v. Kagama, 118 U.S. 375 (1886), United States v. Sandoval, 231 U.S. 28 (1913), etc.

[In 1966 Congress passed 28 U.S.C. 1362 upon which the complaint herein relies for jurisdiction and which provides that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws or treaties of the United States. Judge Friendly held in Oneida Indian Nation of N. Y. State v. County of Oneida, N.Y., 464 F.2d 916,

Exhibit C — Memorandum and Order.

919 note 4 (1972) that the sole purpose of §1362 was to remove any requirement of jurisdictional amount. Contrary to Judge Friendly's holding and consistent with Judge Lumbard who dissented in the Friendly decision this court finds that House Report No. 2040, which accompanied S. 1356 (28 U.S.C. 1362), indicates that in addition to removing the \$10,000 jurisdictional requirement of 28 U.S.C. 1331 the effect of the bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action. U.S.C.C. & A.N. 1966, p. 3147. Reading these sections (25 U.S.C. 175, 28 U.S.C. §§1331 and 1362) together it is apparent that this court has under §1362 a statutory grant of jurisdiction in this matter. Under §1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their own attorneys.]

In its petition for order to show cause and subsequent memoranda the plaintiff relies upon 43 U.S.C. 1457, 28 U.S.C. §§519 and 547, and 25 U.S.C. 175 as a basis for its contention that the United States has a duty to prosecute the charges in the complaint. In addition plaintiff establishes that the United States is a trustee of the land in question for the Indians and as such has a duty to obtain redress from those who trespass upon it. Neither theory creates a duty upon the United States. As stated above there is no duty under 25 U.S.C. 175 which requires the United States to pursue any civil action on behalf of a tribe (Rincon Band of Mission Indians, supra) and the plaintiff concedes that §175 is not mandatory. If that statute does not require representation, then there is no compelling rationale which would create a duty as the result of

Exhibit C — Memorandum and Order.

the trust relationship and the plaintiff cites no authority for such.

Mandamus is not available as a means of compelling government officials to perform their discretionary functions in any particular way. It empowers a court only to enforce ministerial duties, not to perform discretionary acts involving the exercises of judgment. Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966). None of the statutes relied upon by the plaintiff expressly establish a duty of the United States to provide legal representation to the plaintiff. Further there are no specific factual allegations to support the contention that federal defendants have arbitrarily and wrongfully refused to undertake appropriate litigation.

The United States and the defendant Arizona Highway Commission have both pointed out in their memoranda that alleged trespassers were operating under permits, agreements and licenses issued or ultimately derived through various branches of the United States government. The plaintiff does not deny this and a letter written by Assistant Secretary Loesch, Bureau of Land Management, and attached to the United States supplementary memorandum, supports this allegation. On the basis of the record before it the court must conclude that should the United States represent the tribe in this matter ultimately a conflict of interest would result and therefore it is within the sound discretion of the Attorney General to refuse to do so.

The motion to join the United States as an indispensable party is denied. In this matter this court is bound by the 9th Circuit decision of Skokomish Indian Tribe v. France, 269 F.2d 555, 560 (1959). It does not appear that failure to join the United States would radically and injuriously affects its interest nor will

Exhibit C — Memorandum and Order.

a final determination be inconsistent with equity and good conscience. The defendants may raise all the issues with regard to ownership and control of the land that might be raised by the United States. Further if it should be determined that the United States has power to authorize the entry then it will be found that in fact there could be no trespass.

THEREFORE IT IS ORDERED and this does order that the motions of defendants Mesa Sand and Rock, Inc., John L. Merrill, Mrs. John L. Merrill, John L. Merrill, Administrator of the Estate of Ira L. Merrill, Sarah Ann Ickes, John Doe Ickes, husband of Sarah Ann Ickes, Gilbert Allen Merrill and Mrs. Gilbert Allen Merrill, Ira Keith Merrill, Mrs. Ira Keith Merrill and the Arizona State Highway Commission to dismiss for lack of jurisdiction be and the same is hereby denied, as is the motion of the Arizona State Highway Commission to join the United States under F. R. C. P. 19 as an indispensable party.

Further, inasmuch as the defendant United States has shown, pursuant to the order to show cause, that the decision to prosecute on behalf of the tribe is a discretionary one and the decision of the United States not to prosecute was not an abuse of that discretion therefore the motion to dismiss the claim against the defendant United States be and the same is hereby granted.

Further the defendants are granted 20 days within which to further plead.

Done and dated this 11th day of December, 1972.

s/ W.D. MURRAY
W. D. Murray
Senior United States
District Judge. "

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as THE ONEIDA NATION OF NEW YORK, also known as THE ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC., *Petitioners,*

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK, *Respondents.*

BRIEF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., NATIVE AMERICAN RIGHTS FUND, THE NAVAJO TRIBE, THE LAGUNA PUEBLO, THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND THE SENECA NATION, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS.

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IN THE
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I. INTEREST OF AMICI CURIAE

The parties have consented, by written stipulations, to the filing of this brief. The stipulations have been filed with the Clerk of the Court.

The Association on American Indian Affairs (the "Association") is a non-profit membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and

improving the welfare of American Indians. The largest Indian-interest organization in the country, the Association's membership of some 50,000 is made up of both Indians and non-Indians, and is nationwide in scope. Over the years, the Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of amicus curiae briefs with this Court in *Puyallup Tribe v. Department of Game of the State of Washington*, 391 U.S. 392 (1968), in *Warren Trading Post Co. v. Arizona State Tax Comm.*, 380 U.S. 685 (1965), and most recently in *Affiliated Ute Citizens of the State of Utah, et al. v. United States, et al.*, 406 U.S. 128 (1972); *Agua Caliente Band of Mission Indians, et al. v. County of Riverside*, 405 U.S. 1033 (1972); *Mescalero Apache Tribe v. Jones, et al.*, — U.S. —, 36 L. Ed. 2d 114 (1973); and *United States v. States of Nevada and California*, No. 59 Original, October Term, 1972.

The Native American Rights Fund (the "Fund") is a private non-profit corporation organized for the purpose of protecting the rights and enhancing the general welfare of American Indians and providing legal representation and counsel in cases of major significance to Indians. Because of the Fund's expertise in Indian law, the Fund also provides counsel to legal services programs on Indian legal matters under a contract with the Office of Economic Opportunity. The Fund has participated as amicus curiae in numerous cases before this Court.

The Navajo Tribe, the Laguna Pueblo and the Salt River Pima-Maricopa Indian Community are federally recognized tribes of American Indians which exercise jurisdiction over, and are the beneficial owners of,

reservations held in trust by the United States. The Seneca Nation, also a federally recognized tribe, holds title to its three reservations in the State of New York pursuant to federal treaty and statute, and subject to a restriction upon alienation. The Navajo Tribe, with a population in excess of 120,000, is the largest Indian tribe in the country.

This case presents a threshold question of great and continuing concern to amici curiae and to Indians generally—the question of whether an Indian tribe may seek redress in the federal courts for the alleged deprivation by a state, in violation of a federal law, of property rights guaranteed to the tribe by treaties with the federal government. The question is one of particular concern to amici curiae and Indian tribes generally where, as in this case, the Attorney General has declined, on grounds of conflict of interest,¹ to provide a tribe with representation for the purpose of asserting and vindicating its rights.

II. ARGUMENT

A. Introduction

The Oneida Indian Nations of New York and Wisconsin are seeking redress in this case for loss of possession of some of the lands guaranteed to them by a number of treaties with the United States.² This loss resulted from actions of the defendants' predecessor in interest, the State of New York, which allegedly

¹ The conflict of interest apparently was based in this case on the fact that the Oneidas presently are prosecuting a claim against the United States before the Indian Claims Commission pursuant to the Act of August 13, 1946, 60 Stat. 1050, 25 U.S.C. § 70a, *et seq.*

² See Treaty of November 11, 1794, 7 Stat. 44; Treaty of October 22, 1794, 7 Stat. 47; Treaty of January 9, 1789, 7 Stat. 33; Treaty of October 22, 1784, 7 Stat. 15.

violated the Indian Non-Intercourse Act of July 22, 1790, 1 Stat. 138, *as amended* 25 U.S.C. § 177 (1964).³ In short, the petitioners' right of possession and violation of that right asserted in this case are founded upon federal treaties and a federal statute.

Jurisdiction of the district court to hear the Oneidas' complaint was predicated primarily upon 28 U.S.C. § 1331⁴ and § 1362.⁵ The Court of Appeals for the Second Circuit read into both of these statutes a requirement that, in order for federal question jurisdiction to be present, reliance on a federal right must appear on the face of a well-pleaded complaint. The Court of Appeals, therefore, affirmed dismissal for lack of jurisdiction on the grounds that the Oneidas' action is "basically in ejectment" and that a well-pleaded complaint in such an action only has to allege generally rightful ownership and wrongful dispossession, without regard to the specific source of the right or the specific nature of the wrong. *Oneida Indian Nation, etc., et al. v. County of Oneida, etc., et al.*, 464 F.2d 916 (2d Cir. 1972).

The Court of Appeals in reaching its jurisdictional decision did not focus upon whether the Congress intended, or judicial policy dictates, that the special jurisdictional grant to Indian tribes contained in 28 U.S.C. § 1362 be burdened by limitations, developed by the judiciary over the years, on the very general jurisdictional grant conferred on the federal courts by 28 U.S.C. § 1331. Rather, the Circuit Court virtually as-

³ Amendments to the 1790 Act were made by the Act of March 1, 1793, 1 Stat. 330-31; and by the Act of June 30, 1834, 4 Stat. 730.

⁴ Act of March 3, 1875, 18 Stat. 470, *as amended by* Act of June 25, 1948, 62 Stat. 930, and Act of July 25, 1958, 72 Stat. 415.

⁵ Act of October 10, 1966, 80 Stat. 880.

sumed⁶ that the well-pleaded complaint rule necessarily applies equally to both jurisdictional grants and focused solely upon whether the complaint, when tested by that rule, indicated reliance upon a federal right. Amici curiae submit, however, that whether it was ever appropriate for a court to resort to the well-pleaded complaint rule to deprive an Indian tribe of its day in federal court under 28 U.S.C. § 1331, Congress in enacting 28 U.S.C. § 1362 did not intend this special Indian jurisdictional grant, already limited in terms of the class which could benefit thereby, to be further limited by the "niceties of pleading."

B. Congress Intended by 28 U.S.C. § 1362 to Confer Special Federal Question Jurisdiction Upon the Federal District Courts to Adjudicate Civil Actions Brought by Indian Tribes Without Regard to Judicial Limitations on General Federal Question Jurisdiction (28 U.S.C. § 1331) Designed to Prevent the Federal Court Machinery from Being Overburdened by Suits Involving Essentially State Causes of Action.

The Act of October 10, 1966, 80 Stat. 880, 28 U.S.C. § 1362, provides that the federal district courts

shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Nothing on the face of the statute suggests that Congress intended therein to preclude an Indian tribe's access to the federal courts to seek redress for wrongful dispossession of lands.

⁶ The Circuit Court's sole and cursory discussion of any difference between § 1331 and § 1362 is contained in a footnote. 464 F.2d at 919, n.4.

The legislative history of 28 U.S.C. § 1362 indicates that this special federal question jurisdictional grant was to enable Indian tribes to sue on their own behalf in the federal courts where the United States Attorney declines to bring an action on their behalf.⁷ The House Committee on the Judiciary specifically stated, as a justification for the passage of 28 U.S.C. § 1362, that:

The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. Attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues. (H.R. Rep. No. 2040, 89th Cong., 2d Sess. 3 [1966].)

⁷ The Act of March 3, 1893, 27 Stat. 631, as amended by Act of June 25, 1948, 62 Stat. 909, 25 U.S.C. § 175, imposes an obligation upon the local United States Attorney to represent Indians in suits at law and in equity. The courts have held that this statute is not mandatory, notably in cases where bringing suit on behalf of Indians would involve a conflict with some other legitimate interest of the United States. *Rincon Band of Mission Indians v. Escondido Mutual Water Company*, 459 F.2d 1082 (9th Cir. 1972); see, e.g., *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953). The proposition that the United States has the power to sue on behalf of the Oneidas is not open to question. See *United States v. Boylan*, 265 F. 165 (2d Cir. 1920).

Of course, if the United States Attorney had decided to bring this case on behalf of the Oneidas, the fact of the tribe's lack of possession of the disputed land would not be relevant to a determination of federal court jurisdiction.⁸ While the Oneidas requested representation by the United States in this case, the request was denied on the grounds of a conflict of interest engendered by the Oneidas' suit against the United States in the Indian Claims Commission.

The legislative history of 28 U.S.C. § 1362 also indicates that the issue presented in this case is a federal issue which Congress intended would be cognizable by federal district courts. The Department of Interior in urging passage of § 1362 before the Senate and House Committees on the Judiciary stated that "with respect to litigation involving tribal lands that are or were held . . . by the tribe subject to a restriction against alienation imposed by the United States[, t]he issues involved are federal issues." S. Rep. No. 1507, 89th Cong., 2d Sess. 2 (1966). The Department of Interior went on to state that "the tribes should not be required to conduct the litigation [involving such issues] in the State courts."⁹ S. Rep. No. 1507, *supra*, at 3.

⁸ See Act of June 25, 1948, 62 Stat. 933, 28 U.S.C. § 1345.

⁹ This Court has stated that the construction of a bill expounded during the course of hearings thereon should be given

at least that weight which the Court has in the past given to the contemporaneous interpretation of an administrative agency affected by a statute, especially where it appears that the agency has actively sponsored the particular provisions that it interprets. (*Shapiro v. United States*, 335 U.S. 1, 12, n.13 [1948].)

The Court, of course, has always shown great deference to the interpretation given to a statute by the officers charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

This case presents exactly the fact pattern which the legislative history demonstrates was intended by Congress to fall within the ambit of § 1362. The Oneidas are suing for lands taken from them allegedly in violation of the Indian Non-Intercourse Act, 25 U.S.C. § 177,¹⁰ by which Congress imposed restrictions against alienation of Indian land throughout the country. Petitioners assert that, if the decision of the Court of Appeals for the Second Circuit is affirmed by this Court, the objective of Congress in enacting 28 U.S.C. § 1362 will be defeated since this case and, indeed, any other case brought by an Indian tribe concerning lands of which the tribe has been dispossessed, in violation of restrictions against alienation, will not be cognizable by the federal courts.

The sole basis, as previously stated, for the Circuit Court's holding that this case does not present, within the meaning of 28 U.S.C. § 1362, a federal question, is the nicety-of-pleading requirement reflected in the well-pleaded complaint rule. 464 F.2d at 920. The essence of the well-pleaded complaint rule is that, in order for jurisdiction to be present under 28 U.S.C. § 1331, the federal question must appear on the face of the complaint, and the complaint may not anticipate defenses or make allegations in support of the plaintiff's case which are not required by nice pleading rules. See *Taylor v. Anderson*, 234 U.S. 74 (1914); *Joy v. St. Louis*, 201 U.S. 332 (1906).

The well-pleaded complaint rule was fashioned by this Court in *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877), as a basis to limit the number of cases for which access to the federal courts would be

¹⁰ Act of July 22, 1790, 1 Stat. 138, as amended by Act of March 1, 1793, 1 Stat. 330-31 and Act of June 30, 1834, 4 Stat. 730.

available under the general federal question jurisdiction conferred by 28 U.S.C. § 1331. The genesis of the rule lies in this Court's concern that, without such a limitation, the very broad nature of the jurisdictional grant reflected in § 1331 would result in the federal courts being flooded with claims that were essentially more local than federal. This was particularly true with respect to disputes concerning western lands, title to all of which originated with the federal government. *Shulthis v. McDougal*, 225 U.S. 561 (1912); *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877); see also *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900). Thus, "subtle distinctions, dependent on long-forgotten lore as to the forms of action" were utilized to reduce the number of cases which otherwise would be cognizable by the federal courts under 28 U.S.C. § 1331. C. WRIGHT, LAW OF FEDERAL COURTS 59 (1970).

The proposition is not open to question, however, that the grant of federal judicial power found in the Constitution is much broader than the construction which the federal courts have placed on 28 U.S.C. § 1331. See *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1900); *Louisville & Nashville Ry. Co. v. Mottley*, 211 U.S. 149 (1908); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 613-15 (1948); *Zwickler v. Koota*, 389 U.S. 241, 246, n.8 (1967). The only requirement under the constitutional grant of federal question jurisdiction is that claims contain an "ingredient" of federal law. See *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824). Thus, Congress has the constitutional power to confer on the federal courts jurisdiction over federal questions without regard to limitations such as those reflected in the well-pleaded complaint rule.

The Circuit Court, without analysis, merely assumed that the well-pleaded complaint rule should be applied to 28 U.S.C. § 1362 because language contained in both jurisdictional grants is identical with respect to conditioning jurisdiction on the existence of a controversy which "arises under the Constitution, laws, or treaties of the United States." The basis for applying the well-pleaded complaint rule to 28 U.S.C. § 1331, however, does not support application of the same rule to jurisdictional questions under 28 U.S.C. § 1362. The grant of jurisdiction in § 1362 is already limited by the very limited class, namely Indian tribes, which can invoke jurisdiction under this section. No danger exists that federal courts will be flooded under § 1362 with claims that are essentially more local than federal, and the courts, therefore, have no need to impose limitations such as those which may be properly applied to broad jurisdictional grants. See Mishkin, *The Federal "Question" in the District of Courts*, 53 COLUM L. REV. 157 (1953). Moreover, the legislative history of § 1362, as previously discussed, indicates that Indian land claims do not fall within that category of cases which the judiciary intended, by application of the well-pleaded complaint rule, to exclude from the jurisdiction of the federal district courts. S. Rep. No. 1507, *supra*, at 3.

A number of principles of statutory construction, beyond those already discussed, clearly support the proposition that the well-pleaded complaint limitation does not automatically apply, as the Circuit Court assumed, to § 1362 merely because the courts have applied the limitation to the same language in § 1331. This Court has recently held that similar phrases used in two different statutes that appear, at first glance, to have

similar purposes, should not necessarily be interpreted in the same manner. In reversing a decision of the United States Court of Appeals for the District of Columbia, that language in 42 U.S.C. § 1983 has the same meaning as that given by this Court to identical language in 42 U.S.C. § 1982 (*Hurd v. Hodge*, 334 U.S. 24, 31 [1948]), this Court stated:

At first glance, it might seem logical simply to assume, as did the Court of Appeals, that identical words used in two related statutes were intended to have the same effect. Nevertheless, "[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law. . . ." *Atlantic Cleaners & Dyers v. United States*, *supra*, 286 U.S., at 433, 76 L. Ed. 1204. (*District of Columbia v. Carter*, — U.S. —, 34 L.Ed. 2d 613, 618 [1973].)

The Circuit Court, in automatically assuming that the federal question language in 28 U.S.C. § 1362 should be interpreted in exactly the same fashion as the courts have interpreted the same language in § 1331, clearly violated this Court's standards as announced in *District of Columbia v. Carter*. The Circuit Court also ignored a recent admonition of this Court that while a statute should be interpreted

with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking. (*United States v. Bass*, 404 U.S. 336, 344 [1971].)

The intent of Congress, evidenced by the legislative history of 28 U.S.C. § 1362, to include a case such as this within the scope of Indian federal question jurisdiction, is bolstered by the signal principle of Indian statutory construction that doubtful expressions in Acts of Congress affecting Indians are to be resolved in favor of the affected Indians. *See Squire v. Capoe-man*, 351 U.S. 1, 9 (1956); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). The Court, in *Squire*, found that this principle outweighed another cardinal statutory construction principle that exemptions in federal tax laws must be clearly expressed; and, in *Hitchcock*, the Court held that even the long-standing policy of construing certain statutes in a manner that favors a state must give way, where a conflict exists, to this principle of Indian statutory construction.

The rule of *Squire*, *Alaska Pacific*, and *Hitchcock* is particularly significant in the context of 28 U.S.C. § 1362. A restrictive interpretation of § 1362 could deny to the Oneidas and many other federally-recognized tribes not only a federal forum to litigate claims concerning lands of which they have been dispossessed, but any forum to litigate such claims. As the Circuit Court recognized in a footnote to its opinion in this case (464 F.2d at 123, n.9), the Oneidas may not be able to bring their suit in the courts of the State of New York. Since the challenged transaction by which the Oneidas were dispossessed occurred in 1795, the New York courts may be barred from entertaining the Oneidas' suit by the Act of September 13, 1950, 64 Stat. 845, 25 U.S.C. §233, which states, in part:

that nothing herein contained shall be construed as conferring jurisdiction on the courts of the State

of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

The probable lack of a judicial forum, moreover, is not a legislative oversight which will prejudice only the New York tribes. 28 U.S.C. § 1360¹¹ and 25 U.S.C. § 1322¹² impose on certain states, and permit other states to assume, civil jurisdiction over actions to which Indians are parties. Both statutes contain the same provision that the state jurisdiction therein authorized or imposed does not confer jurisdiction to adjudicate the ownership or right to possession of property held in trust by the United States for Indians or property subject to a restriction on alienation imposed by the United States, 28 U.S.C. § 1360(b); 25 U.S.C. § 1322 (b). These provisions, and the similar language in 25 U.S.C. § 233, moreover, are codifications of judicial decisions which reserve exclusively for federal courts the jurisdiction to hear claims involving the right to or possession of Indian lands. *United States v. Minnesota*, 305 U.S. 382 (1938); *Williams v. Lee*, 358 U.S. 217 (1959); see also Judge Friendly's opinion in this case at footnote 9, 464 F.2d at 923. Accordingly, absent diversity jurisdiction pursuant to 28 U.S.C. § 1332, the restrictive interpretation of 28 U.S.C. § 1362 rendered by the Court of Appeals in this case may close all judicial doors to Indian tribes asserting claims for lands of which they have been wrongfully dispossessed.

¹¹ Act of August 15, 1953, 67 Stat. 589, as amended by Act of August 24, 1954, 68 Stat. 795 and by Act of August 8, 1958, 72 Stat. 545.

¹² Indian Civil Rights Act of April 11, 1968, 82 Stat. 79.

III. CONCLUSION

Amici submit that the Court of Appeals for the Second Circuit erred by failing to scrutinize the purposes and understandings of Congress in enacting 28 U.S.C. § 1362 and by instead automatically applying to this already limited jurisdictional grant the well-pleaded complaint rule, a judicially wrought limitation on the broad federal question jurisdiction conferred by 28 U.S.C. § 1331. Furthermore, the Second Circuit disregarded this Court's repeated directive that statutes designed to benefit the Indians of this country should be construed to effectuate that purpose. Rather, the Circuit Court rendered a decision not constitutionally compelled and not supported by the applicable law or its legislative history, which may deprive Indian tribes of any forum to challenge the legality of a dispossession of their tribal land.

Amici urge this Court to reverse the decision below and to find that 28 U.S.C. § 1362 was intended by Congress to extend the original jurisdiction of the federal district courts to suits initiated by Indian tribes for land of which the tribes were dispossessed allegedly in violation of federal laws and treaties.

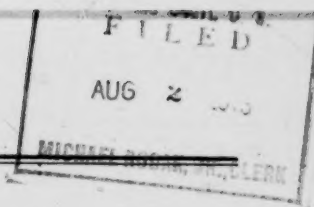
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Dated: July 19, 1973.

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SUPREME COURT, U. S.



IN THE
Supreme Court of the United States
October Term, 1972.

No. 72-851.

THE ONEIDA INDIAN NATION OF NEW YORK
STATE, also known as THE ONEIDA NATION OF NEW
YORK, also known as THE ONEIDA INDIANS OF NEW
YORK, and THE ONEIDA INDIAN NATION OF
WISCONSIN, also known as THE ONEIDA TRIBE OF
INDIANS OF WISCONSIN, Inc.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,
Respondents.

Brief of the Respondent, County of Madison.

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IN THE
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No. 72-851

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as The Oneida Nation of New York, also known as The Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as The Oneida Tribe of Indians of Wisconsin, Inc.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

Brief of the Respondent, County of Madison.

I. ARGUMENT.

A. Introduction.

The petitioners aver that in 1795 a treaty was executed by the petitioners' forefathers and the State of New York, the respondent's predecessors in title, for approximately 100,000 acres of land owned by the petitioners' ancestors since the world was made and deeded to the State of New York.

The petitioners claim their progenitors were beguiled into transferring the title of the land, and, therefore, the deed to the State of New York violated certain treaty obligations of the United States and of the Indian Nonintercourse Act of 1790.¹

(¹) Statute 137 (1790), now 25 U.S.C., Section 177 (1964).

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SUPREME COURT, U. S.

(152-D)

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IN THE

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October Term, 1972

No. 72-851

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v.

THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,

Respondents.

BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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IN THE
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THE ONEIDA INDIAN NATION OF NEW YORK
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Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and
THE COUNTY OF MADISON, NEW YORK,

Respondents.

**BRIEF OF THE STATE OF NEW YORK AS AMICUS
CURIAE IN SUPPORT OF RESPONDENTS**

Interest of Amicus Curiae

This *amicus curiae* brief by the Attorney General of the State of New York, is submitted by the State in support of the respondents herein. The State is concerned in this action for two reasons: One, the premises involved in this

action were granted to the People of the State of New York along with other lands by the petitioners by deed made in 1795 and the complaint attacks the validity of this deed. If this deed is not valid it would affect other lands now or formerly owned by the State of New York; Two, the lands involved are used by the respondents for public purposes which benefit all the People of the State of New York.

Facts

The petitioners commenced this action by filing a summons and complaint in the United States District Court for the Northern District of New York. The summons was filed February 11, 1970 and the complaint on February 5, 1970. An amended complaint was filed July 29, 1970 (1-2).¹

The instant suit was brought by the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin against the Counties of Oneida and Madison, New York for damages in the amount of \$10,000, in the form of rent for land used by the counties for building roads and other public improvements. The lands had been deeded to New York State by the Indians and later acquired by the counties. The Oneida Indian Nation of Wisconsin apparently was joined as a plaintiff as basis for jurisdiction on the ground of diversity of citizenship.

The basic claim in the complaint was that in 1795 in violation of the Indian Non-Intercourse Act of 1790, a sale of lands was made by the plaintiffs to the State of New York when no United States Commissioner was present. The complaint alleges that the payment for said lands in that sale was less than that which was being paid for

¹ Page references are to petitioners' Appendix.

similar lands (7-8). The complaint demanded "judgment against defendants in the sum of at least TEN THOUSAND DOLLARS (\$10,000.00), plus such other and further monetary damages as the Court may deem just." (p. 9010). An amended complaint was filed pursuant to an order granted by United States District Court Judge Port, dated December 28, 1971.

The amended complaint contained a new paragraph which read as follows (23):

"22. Subsequent to the 'Treaty' of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least \$10,000.00, exclusive of costs and interest."

The demand in the amended complaint was the same as that in the complaint (23).

Paragraphs 5 and 6 of the complaint allege Title 25 U. S. C. A. § 177 to be the same as Indian Non-Intercourse Act of 1790 (1 Stat. 137) (5-6). The ban on sales of Indian land in the 1790 Act reads as follows:

"SEC. 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (Emphasis supplied.)

The inclusion of the words "any state whether having the right of pre-emption to such lands or not" would include the original thirteen states which had the right of pre-emption to Indian lands as successor to the Crown of England.

At the time of the sale of lands involved herein, the 1790 Act was not the law. The Indian Non-Intercourse Act of 1793 (1 Stat. 329) was in effect. The Act of 1793 omitted the reference to "any state, whether having the right of pre-emption to such lands or not". These words were excluded from all subsequent amendments and from the present 25 U. S. C. A. § 177 (Indian Non-Intercourse Act). The omission of the pre-emption states from these Acts would indicate an intent to exclude them from the ban on sales of Indian lands without the presence of a United States Commissioner. Thus, New York State is not included under the 1793 Act in the ban against Indian sales without the presence of a Commissioner. This law read as follows (1 Stat. 329):

"SEC. 8. *And be in further enacted*, That no purchase or grant of lands, or of any title or claims thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States,

in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."

The respondents moved to dismiss the complaint, by motion filed November 12, 1970, on the following grounds (24-26):

"1. The Court has no jurisdiction. Section 52 of the County Law states that the place of trial, when the County is a defendant, shall be in the county against which the action was brought. Further, the Court does not have jurisdiction of the subject matter on the ground of the diversity of citizenship, since one of the parties, plaintiff, The Oneida Indian Nation of New York State, are citizens of the same state as the defendants, County of Oneida and County of Madison.

2. The Complaint fails to set forth a cause of action. [24]

3. It appears on the face of the plaintiffs' Complaint, a copy of which is attached hereto and marked Exhibit 'A', that the claim asserted did not accrue, if in fact, it accrued at all, to the plaintiff within six years before the initiation of this action and, therefore, the action is barred by the statute of limitations.

4. The prolongation of the institution of the within suit by the plaintiffs is barred by laches.

5. The current owners of the land alleged to be withheld illegally from the plaintiffs have been held by their present occupants and their predecessors in title by adverse possession for over 150 years.

6. The defendant, County of Madison, as a bonafide purchaser for value of said premises without notices as to any alleged fraud involved in the purchase thereof from the plaintiffs and, therefore, is not a proper party in this action.

7. The plaintiffs' have not exhausted all of their remedies, since they presently have an identical claim

pending against the United States of America before the Federal Indian Claims Commission.

8. Chapter 70 of the Laws of 1806 created the County of Madison, which originally was part of the County of Chenango. Section 8 of the Court of Claims Act became law in 1920 by chapter 922. That section stated that the State waived immunity from liability in an action and henceforward would assume liability and consented to have the same determined in accordance with the same rules and laws as applied to actions in the Supreme Court against individuals and corporations. The cause of action in the instant case arose many years before Section 8 of the Court of Claims Act became law. [25]

9. There is no enabling act which permits the with- in plaintiffs' to institute the cause of action alleged in the plaintiffs' Complaint.

10. The controversy alleged in the Complaint actually would be against the United States of America, and/or the State of New York and not the County of Madison, since the County of Madison was not created until 1806, which date is subsequent to the alleged deprivation of land owned by the plaintiffs' forebearers.

11. And for such other and further relief as to this Court may seem just and proper."

The petitioners (plaintiffs in the action) cross-moved for leave to file an amended complaint, which motion as noted above, was granted on December 4, 1970 (57).² The amended complaint was dismissed by Judge Port on November 11, 1971 (107), judgment was filed the same date and the matter was appealed to the United States Court of Appeals, Second Circuit (94). The Court of Appeals rendered a judgment against the petitioners on June 12, 1972, a motion for rehearing denied September 11, 1972. Petitioners applied for certiorari which was granted by this Court on June 4, 1973 (108).

² The amended complaint included paragraph 22 hereinbefore set forth and no other change.

The Decision Below

(Reported: 464 F. 2d, 916-925)

In deciding for the respondents herein, the Court below held:

1. That 28 U. S. C. A. 1362 was enacted solely for the purpose of removing any jurisdictional amount required in civil actions brought by Indians in the Federal courts where the controversy arose under the Constitution, Laws or Treaties of the United States.

2. The allegation that a deed was secured by the State for the cession of Indian lands, which deed did not comply with the Indian Non-Intercourse Act, in and of itself did not establish the existence of a Federal question.

3. In determining whether there was a Federal question, only those facts which would appear in a "well-pleaded" complaint could be considered (pp. 919-920).

4. Allegations by an Indian tribe in a complaint to the effect that cession of their lands had been secured without the presence or approval of a Federal Commissioner in violation of the Indian Non-Intercourse Act and a claim for damages based on rental value was basically an action in ejectment and subject to dismissal for want of Federal jurisdiction under the "well-pleaded" complaint rule.

5. A complaint in an ejectment action does not present a Federal question even though the plaintiff claims right or title under a Federal statute or treaty.

6. The purpose of the rule governing pleading was to make complaints simpler (pp. 920-921).

7. Jurisdiction in the instant case could not be sustained in the Federal courts based on a New York statute per-

mitting an action to remove a cloud on title by a person not in possession when such rule does not exist in the Federal courts.

8. Federal courts may not apply State statutes broadening State equity jurisdiction that did not exist at the time of the adoption of the Constitution (pp. 921-922).

9. The Oneida Indian Nation of New York State was not a citizen of a State different from New York for the purpose of securing Federal jurisdiction under 28 U. S. C. A. 1332(a).

10. The addition of the Oneida Indian Nation of Wisconsin as a plaintiff, although it might be considered a citizen of Wisconsin, did not confer Federal jurisdiction under 28 U. S. C. A. 1332(a) since there must be complete diversity of citizenship under this section for there to be Federal jurisdiction (pp. 922-923).

11. A county is not a person within the meaning of Civil Rights statutes (pp. 923-924).

Summary of Argument

I. The petitioners in this action seek damages for lands occupied by the respondents for buildings, roads and other public purposes. The lands in question were in 1793 part of the Oneida Reservation and the State of New York as successor to the Crown of England had the original pre-emption right to these lands. It exercised its pre-emption to them in 1795 when it secured a deed to the lands from the Oneida Indians, which deed conveyed to the State of New York any interest that the Oneida Indians had to the occupation of these lands.

H. The Indian Non-Intercourse Act was first passed in 1790 and it included bans on sales of Indian lands to

any person or persons or to any state whether having the right of pre-emption to such lands or not without a United States Commissioner being present at the time of the negotiation for the lands. The Non-Intercourse Act was amended in 1793 by omitting the portion of the 1790 act underlined in the preceding sentence, and therefore should be interpreted as not covering those states such as New York which had acquired the Indian pre-emption rights as successors to the Crown of England.

III. New York State adopted this interpretation of the Indian Non-Intercourse Act after the amendment of 1793 and ever since has not required a Federal Commissioner to be present when it acquired land from New York State Indians. During the years thereafter, many conveyances were made by Indian tribes residing in New York of portions of their lands to the State of New York. The Federal government and the Indians for close to two hundred years acquiesced in this interpretation by New York State. An interpretation made at or about the time a law was enacted should be given great weight, especially when any modification or change in the interpretation would result in invalidating titles to land claimed through a chain of title of close to two hundred years.

IV. The Eleventh Amendment to the United States Constitution is a bar to actions being brought against a county which is a subdivision of the State when the action involves land for highway and other public purposes, because such purposes are deemed to be for the benefit of and in trust for all The People of the State of New York under New York law.

V. Sections 28 U. S. C. A. 1331(a) and 28 U. S. C. A. 1362 are two Federal jurisdictional statutes which are *in pari materia*. The phrase "arising under the Constitution,

laws or treaties of the United States", which appears in both sections, should be interpreted in the same manner. 28 U. S. C. A. 1362 should not be interpreted so as to disregard the inhibiting effect of the "well-pleaded complaint" rule since the courts when interpreting 28 U. S. C. A. 1331 (a) have applied the "well-pleaded complaint" rule and since the legislative reports³ indicates that the sole purpose of enacting Section 1362 was to give the Indians the right to sue in the Federal courts when the amount involved was less than the jurisdictional amount of \$10,000 required under 28 U. S. C. A. 1331(a). Under the "well-pleaded complaint" rule, the courts should disregard, as the Court below held, references to Indian treaties and laws which are set up in anticipation of defenses and unnecessary in the present complaint to secure the relief sought.

VI. The Court below was correct when it held that the instant action, which sought damages for occupancy of lands by respondents for two years (1968 and 1969) was dependent upon petitioners' right to possession of those lands and therefore basically an ejectment action.

VII. New York State Indian Law §§ 5 and 11(a) give the Indians and Indian nations a right to sue in State courts. This right is not limited by the provisions of 25 U. S. C. A. 233. Although 25 U. S. C. A. 233 contains a limitation as to Indian actions which accrued prior to September 13, 1952, the New York State laws contain no such limitation. This Court has recognized the jurisdiction of New York State courts in actions brought by an Indian nation where there was a New York State statute granting the Indians capacity to sue. See *Seneca Nations v. Christy*, 162 U. S. 283 (1896).

³ See appendix to this brief.

VIII. Even if there were concurrent jurisdiction in both Federal and State courts in the instant case, the Federal courts should apply the doctrine of abstention because an interpretation of the New York State Statute of Limitations is involved and the New York courts should be given an opportunity to make this interpretation.

POINT I

The construction of the Indian Non-Intercourse Act by New York State for close to two hundred years, acquiesced in by both the Federal government and the Indians, should not be changed especially where change would result in an economic upheaval.

Petitioners' contention, that under the Indian Non-Intercourse Act the State of New York was obliged to act in the presence of, and with the consent of, a United States Commissioner before a cession or sale of Indian lands to the State could have been made, is incorrect.

It is our position that New York State and the other twelve original states were not meant to be included in the Indian Non-Intercourse Act ban. This ban on sales by Indians without the consent of a United States Commissioner we submit, applied only to private purchasers, and those States created from United States Territories. This construction has been followed by New York State for close to two hundred years.

The Non-Intercourse Act as first enacted in 1790 (1 Stat. 137) included New York State. The following language in the Act indicates this:

"* * * no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state,

whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

The section refers to states having the pre-emption right. The pre-emption right was the first right of acquisition of the Indian's interest in the reservation lands. New York State had the pre-emption right to the Oneida lands and, therefore, was included in the ban of sales by the Oneidas without Federal consent.

However, the 1790 Statute was not the law when the transaction in 1795 between the Oneida Indians and the agents of the State of New York involving the lands in this complaint was made. The 1793 Act (1 Stat. 329) was in effect and that omits the words. It reads in part as follows:

"* * * That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; * * *."

The omission from this latter act of the words "any state having the right of pre-emption to such lands or not", would exclude the original thirteen states from the ban in the Non-Intercourse Act.

United States v. Franklin County, 50 F. Supp. 152 (Dist. Ct., N. D. N. Y., 1943), so held when it was construing an 1802 act which was basically the same as the 1793 Act (pp. 155, 156):

"The history of the Act of 1802 and preceding legislation is indicative of an intent to exempt a state 'having the right of pre-emption' from the provisions thereof. The first Indian Intercourse Act of 1790 in-

validated by its language the sale of lands within the United States to any person or persons, 'or to any state, whether having the right of pre-emption or not.' The clause quoted was omitted from the Act of 1802 and from the preceding Acts of 1796 and 1799. The omission is significant when viewed in the light of the practical construction given to the Act by both the State of New York and the United States."

* * *

"To require the presence and approbation of a United States Commissioner at a treaty or transaction where the State has the exclusive right to deal with the matter concerned would appear to result in a conflict of legal rights. The evidence shows that the existence of such requirement was not recognized either by the State of New York or by the United States.

The Act, by its terms, does not require the presence of a United States Commissioner at a treaty as a prerequisite to its validity, but gives an agent of a state the lawful right to negotiate with the Indians under given conditions. It is at most regulatory, designed to prevent fraud. Here no fraud is charged.

The conclusion is reached that the conveyance of 1824 by the St. Regis Indians to the State of New York is valid and that the provisions of the Act of 1802 does not apply thereto.

The judgment dismissing the complaint might be placed upon the lack of evidence to show the invalidity of the leases of 1817 and the conveyance of 1824, but in arriving at the conclusion the following quotation taken from *Seneca Nation of Indians v. Christie*, 126 N. Y. 122, at page 147, 27 N. E. 275, at page 282, seems to be especially pertinent: " * * * In view of the numerous Indian titles in this state originating in treaties by the state, or in purchases made with its sanction by individuals, we prefer to place our judgment on the broader ground, which will remove any cloud upon the validity of those titles. * * * "

There existed a unique relationship between the original thirteen states and Indians living on reservations in those states. As successor to the Crown of England title to the lands was in the States. The Indians only had a right of occupancy as the Courts have held.

United States v. Franklin County, 50 F. Supp. 152, *supra*, citing *Johnson & Graham's Lessee v. McIntosh*, 21 U. S. 543 (1823) stated the following (p. 155):

"[2] The right of the Indians in so-called 'tribal lands' was one of occupancy only; the fee of the lands remained in the sovereign which in the instant case was the State of New York. *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681."

Chief Justice MARSHALL had said in *Johnson & Graham's Lessee*, *supra* (p. 589):

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected."

And continuing at pages 591-592:

"However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice."

It is because of this particular relationship that the distinction was made by Congress between the original States having the right of pre-emption and other persons or States, omitting from the 1793 Act the ban on sales by Indians without the presence of the United States Commissioner, as to the "pre-emption" States.

As stated, the Indians did not have title to the lands but only a right of occupancy. It has been held by this Court that the right of occupancy was not a compensable right. In *Tee-Hit-Ton Indians v. United States*, 348 U. S. 272 (1955), this Court said (p. 279):

"It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

United States as Guardian, etc. v. Santa Fé Pacific R. Co., 314 U. S. 339 (1941) was an action brought on behalf

of the Walapai⁴ Indians to compensate them for lands taken from them. In 1881, the Walapais had applied to the President of the United States for an Executive Order setting aside a reservation for them, which was issued in 1883. The Santa Fé Pacific Railroad took certain lands from the Indians for railroad purposes. The Indians had only a right of occupancy as to some of the lands taken and the balance was in the reservation which had been set aside for them by the United States.⁵ In that case, this Court held that, as to the land in the reservation, the Indians were entitled to compensation, but not as to the land to which they had a mere right of occupancy, saying (357-358):

"The Executive Order creating the Walapai Indian Reservation was signed by President Arthur on January 4, 1883. There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not.

. . .

"[I]n view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being pre-empted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a

⁴ Sometimes called Hualapai Indians.

⁵ This is to be distinguished from the instant case where there was no grant of a reservation by United States to petitioners.

reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation." (Emphasis supplied.)

Here, too, the lands in question were not used by the Oneidas for close to two hundred years and this must be regarded as the equivalent to a release of any tribal rights.

As a matter of fact, chapter 185 of the New York Laws of 1843 was a statute enacted for the sale of lands of some Oneida Indians who were leaving New York State and to provide compensation for the lands sold. This law contained the following:

"§ 1. The Oneida Indians owning lands in the counties of Oneida and Madison, are hereby authorized to hold their lands in severalty, in conformity to the surveys, partitions and schedules annexed to and accompanying the treaties made with the said Indians, by the people of this state, in the year one thousand eight hundred and forty-two, and now on file in the office of the secretary of state; and the lots so partitioned and designated by said survey to the said Indians shall be deemed to be in lieu of all claims and interest of the said Indians, in and to all other lands and property in the Oneida Reservation, except the mission lot on lot one, and the church lot on lot two, of the Oneida Purchase, of May 23d, 1842, which are to be held by the said Indians as tenants in common." (Emphasis supplied.)

The emphasized portion of this section shows statutory intent that acceptance by the Indians of the proceeds of the sale was to be considered a release. The acquiescence by the Oneidas and Federal government in the transfer of the lands herein involved for almost two hundred years indicates an acceptance of this compensation.

In any event, construction of a statute during the course of close to two hundred years by the State and Federal

government must be given great weight. In *Udall, Secretary of the Interior v. Tallman, et al.*, 380 U. S. 1 (1964), at p. 16 of that opinion, this Court said:

"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n v. Aragon*, 329 U. S. 143, 153. See also, e.g., *Gray v. Powell*, 314 U. S. 402; *Universal Battery Co. v. United States*, 281 U. S. 580, 583. * * *

This rule is very old. Chief Justice TANEY in *United States v. State Bank of North Carolina*, 31 U. S. 29 (1832), said (p. 30):

"The construction of the law of the United States now claimed, has been that of universal practice since it was enacted. From 1797 down to the present period, it has been applied in favour of the United States to bonds not due, as well as to others to become due; and the estates of insolvents and intestates have been adjusted and settled on this principle in every section of the Union. This received construction will induce the Court to hesitate before it will adopt another; as it would open those long-established settlements, and would be productive of great difficulty and confusion."

CRAWFORD on *Statutory Construction* (1940) § 218, p. 388 states the rule as follows (388-389):

"§ 218. CONTEMPORANEOUS CONSTRUCTION AND USAGE, GENERALLY.

—Where the meaning of a statute is in doubt, the court may resort to contemporaneous construction—that is, the construction placed upon the statute by its contemporaries at the time of its enactment and soon there-

after—for assistance in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment and acquiesced in by the courts and the legislature for a long period of time. As is obvious, the meaning given to the language of a statute by its contemporaries is more likely to reveal its true meaning than a construction given by men of another day or generation. Even words change in meaning with the march of time. And the meaning given by contemporaries can be revealed with no more certainty than be resort to the common usage and practice under the statute itself over a considerable period of time.”

The State of New York made many treaties with the Indians occupying lands within the State. An affidavit by Henry S. Manley, an authority on the subject, which was filed in *Tuscarora Nation of Indians v. Power Authority*, 257 F. 2d 885 (2d Cir.), cert. den. 358 U. S. 841 (1958), contained the following:

“No treaty seems to have been entered into between the Indians and the State during the period the 1790 act was effective. A few months after it was replaced by the 1793 act New York resumed its accustomed course of dealing.

“During the next fifty-two years it made at least thirty-nine treaties with various bands of New York Indians, all without any participation by the United States. Titles to very large and important tracts of the State are held under those treaties. New York departed from that practice on five occasions, all in the period 1797-1802, and for those five treaties availed itself of the procedure suggested by the proviso to the 1793 act.”

Thus, the State of New York, with at least the tacit consent of the United States, has interpreted the amended Indian Non-Intercourse Act so as to negate the necessity of securing the consent of the United States. If this con-

struction should be wrong and title be held to be in the Indian nations, it would affect the titles to a great portion of the lands in western New York State and result in economic havoc.*

The New York Court of Appeals recognized this fact in *Seneca Nation v. Christy*, 126 N. Y. 122 (1891) at pp. 137-141:

"The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of the state of New York. Laws were enacted from time to time by the legislature of the state, authorizing treaties with the Indians. (See Laws of 1784, ch. 22; Laws of 1788, ch. 47; Laws of 1813, ch. 29, § 52; Laws of 1839, ch. 58; Laws of 1831, ch. 234.) In 1788, the state entered into treaties with the Onondagas and Oneidas, and in 1789 with the Cayugas, whereby it acquired the title to large tracts of land in the central part of the state, and many subsequent treaties were made with these tribes by which the state finally acquired nearly all their remaining lands. Similar treaties were made with the St. Regis, Mohawk and Seneca Indians. In all, more than thirty treaties were made between the state and various tribes, independently and without the intervention of the government of the United States. (See Collection of State Treaties, Assembly Document, 1889, in Report on Indian Problem). They were generally negotiated by commissioners appointed by the legislature, acting in conjunction with the governor of the state. It appears that on

* The Affidavit of Henry S. Manley, *supra*, filed in *Tuscarora Nation of Indians v. Power Authority*, 257 F. 2d 885, states that there were 39 treaties made by New York State with various tribes of Indians after the 1793 Act and in only five did the Commissioners of the United States participate.

two or three occasions a commissioner of the United States was present when treaties were made. But in all cases the state and not the United States was the contracting party with the Indians. The treaties were in no sense treaties made by the president and senate of the United States. The list of governors who participated in making them, embraces many of the great names in the history of the state. It includes the Clintons, Tompkins, Van Buren, Marcy, Wright, Seward. By virtue of these treaties this state entered upon the lands acquired thereby, and they have been sold and built upon and improved, and comprise some of the fairest and most prosperous districts of the state.

. . .

"It cannot, we suppose, be questioned that these treaties were constitutionally made in the exercise of the treaty-making power of the Federal Government, and became under the Constitution the supreme law. But the dealing by the general government with the Indian tribes through treaties was resorted to as a convenient mode of regulating Indian affairs, and not because, as with other nations, it was the only mode, independently of the arbitrament of war, of dealing with them.

. . .

"The practical construction given by the state of New York to the Federal Constitution, as shown by the numerous treaties made by it with the Indian tribes, and the recognition by the federal authority of their validity is very strong evidence that the clause in the Federal Constitution prohibiting the states from entering into treaties, does not preclude a state having the pre-emption right to Indian lands, from dealing with the Indian tribes directly, for the extinguishment of the Indian title. Such a dealing is not a treaty in the constitutional sense, and is not inconsistent with the exercise by the United States of its general jurisdiction for the protection of the Indians in their right of occupancy of their lands. The remark of Justice McLEAN, in his opinion in *Worcester v. State of Georgia* (6 Pet. 580), that 'Under the Constitution no

state can enter into any treaty, and it is believed that since its adoption no state under its own authority has held a treaty with the Indians,' was true as referring to treaties for lands owned by the general government, but if intended to have a broader scope, seems opposed to the facts of history. The circumstance that Gov. George Clinton, in 1793, after the passage of the Indian Intercourse Act of that year, transmitted to Mr. Jefferson, then secretary of state of the United States, exemplified copies of the different treaties entered into by the state of New York with the various tribes of Indians within its borders, which treaties congress formally approved, does not militate against the view that the right of the state to enter into those treaties was not prohibited by the Constitution. The treaties had gone into effect and had been executed, and the act of Governor Clinton was a prudential measure to remove any possible cloud upon the action of the state."

The interpretation of the Indian Non-Intercourse Act, by the State of New York for close to two hundred years which has been relied on by persons in accepting title to lands, should not be changed, especially in a situation which would upset land titles going back to the early 1800's and cause economic bedlam in all of the original states.

POINT II

Since the defendants are using the land in question for a State purpose for the benefit of all of the people of the State of New York, and thus are acting as agents of the State, the 11th Amendment of the U. S. Constitution is a bar to this cause of action being brought in the Federal courts.

Federal courts do not have jurisdiction of the defendants in this action since defendants are acting solely as agents of the State which has not consented to be sued in the Federal courts and which has immunity from suit in the Federal courts by reason of the 11th Amendment to the U. S. Constitution.

The 11th Amendment denies Federal jurisdiction in an action against a state when brought by citizens of another state or nation. This principle has been extended to suits brought against a state by its own citizens in the Federal courts. (See *Hans v. Louisiana* [1890], 134 U. S. 1.) This Court held in *Parden, et al., v. Terminal Railway of the Alabama State Docks Department, et al.*, 377 U. S. 184 (1964), that an unconsenting state is immune from suit whether it be by its citizens or those of another state, the opinion saying (p. 186):

"Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another State. *Hans v. Louisiana*, 134 U. S. 1; *Duhne v. New Jersey*, 251 U. S. 311; *Great Northern Life Ins. Co. v. Read*, 322 U. S. 47, 51; *Fitts v. McGhee*, 172 U. S. 516, 524. See also *Monaco v. Mississippi*, 292 U. S. 313. Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' *Hans v. Louisiana, supra*, 134 U. S., at 10; see *Duhne v. New Jersey, supra*, 251

U. S. 311; *Smith v. Reeves*, 178 U. S. 436, 447-449; *Ex parte New York*, 256 U. S. 490, 497-498."

The Oneida Nation of New York is a citizen of New York State and the Oneida Indian Nation of Wisconsin is a citizen of Wisconsin. Neither has the capacity to sue in the Federal courts where the defendant is an agency of the State acting for the State in a governmental capacity.

Counties in New York State as distinguished from other municipal corporations such as cities, villages and school districts, exist only as agents of the State performing public functions for the benefit of all. In the case of other New York municipal corporations, the incorporation is initiated usually by citizens rather than the New York State Legislature. In the case of counties, the New York State Legislature itself acts without a petition by citizens of New York and on its own initiative forms a county.

In *Matter of County of Cayuga v. McHugh*, 4 N Y 2d 609, the New York Court of Appeals described counties as follows (pp. 614-615):

"Counties, as civil divisions of a State, had their origin in England and were formed to aid the more convenient administration of government (*Markey v. County of Queens*, 154 N. Y. 675, 680). So it is today that counties are mere political subdivisions of the State, created by the State Legislature and possessing no power save that deputed to them by that body (*Village of Kenmore v. County of Erie*, 252 N. Y. 437, 441-442, *City of Tulsa v. Oklahoma Natural Gas Co.*, 4 F. 2d 399, 403, appeal dismissed 269 U. S. 527; 15 C. J., Counties, § 4, pp. 393-394). Insofar as political and governmental powers of a county (municipal corporation) are concerned, it is clear that the county is a mere agent of the State and as such is subject to the control of the Legislature (*County of Albany v. Hooker*, 204 N. Y. 1, 9-10; *Hunter v. Pittsburgh*, 207 U. S. 161, 178-179; *Williams v. Eggleston*, 170 U. S. 304, 310; 20 C. J. S., Counties, § 1, pp. 754-755)."

(See also *McQuillen Mun. Corps.* [3d ed.] § 2.46a; *Curtis v. Eide*, 19 A D 2d [N. Y.] 507 [1st Dept., 1963]).

When a subdivision of a state is sued, the nominal caption is not the determining factor of whether the 11th Amendment is a bar, but the nature of the action brought against the subdivisions is. *In re Ayers*, 123 U. S. 443 (1887), contained the following (p. 492):

"It is, therefore, not conclusive of the principal question in this case, that the State of Virginia is not named as a party defendant. Whether it is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record."

(See also *Tardan v. Chevron Oil Co.*, 332 F. Supp. 304 [D. C., La., 1971]; *Dupont v. South Carolina Public Service Authority*, 100 F. Supp. 778 [D. C., S. C., 1951]; *Meyerhoffer v. East Hanover Tp. School District*, 280 F. Supp. 81 [D. C., Pa., 1968].)

The immunity exists even where the state agency is an autonomous entity (*DeLong Corporation v. Oregon State Highway Commission*, 233 F. Supp. 7 [D. C. Ore. 1964]).

In determining whether the transaction in question was ultimately attributable to the State, the Federal Courts will consult the decisions of the State courts (*Fleming v. Upper Dublin School District*, 141 F. Supp. 813 [D. C. Pa., 1956]).

To the extent that a subdivision such as a county engages in governmental as opposed to proprietary activity, it acts as the agent of the state, performing state functions and enjoying state immunity. In *Graham v. Hamilton County, State of Tennessee*, 266 F. Supp. 623 (D. C., Tenn., 1967), a suit was brought by a citizen of Georgia against Hamilton

County, Tennessee. Graham claimed that the County built an entrance ramp for a highway depriving him of access to a necessary road. The ramp although built by the County was financed through Federal and state funds. In *Graham*, the Court noted that (p. 624):

"However, for a State to take property for public use without just compensation would be a deprivation of due process of law and would violate both the Constitution of the United States (Amendment 14, Section 1) and the Constitution of the State of Tennessee (Article 1, Section 21). The Court is aware of no consent, statutory or otherwise, given by the State of Tennessee for itself or its political subdivisions to be sued in a foreign jurisdiction for damages for a taking under the power eminent domain."

It continued (p. 625):

"However, 'the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.' In *Re Ayers*, (1887) 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216; *Poindexter v. Greenhow*, (1885) 114 U. S. 270, 29 L. Ed. 185, 5 S. Ct. 903. This is an especially apt point in the instant situation, because of the somewhat peculiar rules of law in Tennessee relating to actions by landowners claiming a taking of property for highway purposes. It was made clear by the Supreme Court many years ago that the Eleventh Amendment test is one of substance and not of form."

And concluded (p. 626):

"Accordingly, the Court is of the opinion that the State is the real party in interest in the present action, and is a 'party' in the sense of the Eleventh Amendment. This being so, the present action is not within the judicial power of the United States and thus not within the jurisdiction of this Court."

In *Markey v. County of Queens*, 154 N. Y. 675 [1898], the New York State Court of Appeals applied the doctrine of state immunity in favor of Queens County when the County was sued for personal injuries sustained by the plaintiff because of the County's alleged negligent maintenance of a bridge. In that case, the Court said (680-681):

"By the common law of England, a county, though sometimes regarded as a *quasi* corporation, could not be subjected to a civil action for a breach of its corporate duty; unless such an action was expressly given by statute. The duty of maintaining and repairing bridges belonged to it; but the only remedy for a breach of that duty was by presentment or indictment. An unsafe condition of a highway, or a bridge as a part of the highway, was regarded as the subject of a popular action and not of a private action.

• • •

"The authority of that case, as settling the rule at common law that no civil action could be maintained for an individual injury, in consequence of the breach of a public duty on the part of the inhabitants of a county, has been repeatedly recognized in England and in this country.

• • •

"In this state its division into counties, or sections, for the purposes of local government was but a continuance of a method, which, while a colony, it had adopted from England. By the Constitution of the state, it was provided that such parts of the common law as formed the law of the colony of New York were retained as the law of the state. If under the common law counties could not be subjected to private actions, for the results of acts done in the performance of governmental duties, then it should follow that counties of this state could not become liable to such actions; unless the common law, in that respect, has been changed by statute."

(See also *City of Albany v. State of N. Y.*, 21 A D 2d [N. Y.] 224 [3rd Dept., 1964]; *United States v. Cattaraugus County*, 71 F. Supp. 413 [D. C. W. D. N. Y., 1947]).

Thus in New York State use of lands for highway purposes is a governmental purpose and an agency making such use is entitled to all governmental immunity available to the State in a like case. Federal courts have also applied the same rule as the New York State courts with respect to counties, the test on the question of 11th Amendment immunity, being this is the real party in interest (*United States v. Cattaraugus County*, 71 F. Supp. 420, *supra*).

The complaint in the instant case alleges "The defendants currently occupy parts of said premises for buildings, roads, and other public improvements" (9).

Such a use is governmental. It is as if the State itself were engaged in the use. Therefore, the counties are entitled to the same 11th Amendment immunity from action in the Federal courts as the State would have.

POINT III

Since this Court has held that the right to possession of real property is not a Federal question, even though Federal laws and treaties have been alleged by petitioners in anticipation of a defense, the complaint fails to state a Federal question and Federal courts do not have jurisdiction.

This Court should exercise the doctrine of abstention even if the complaint did state a Federal question, since recovery would depend on interpretation of New York statutory law and since the petitioners have capacity to sue in New York State Courts.

- A. Under the "well-pleaded complaint" rule, despite the fact the the petitioners set up Federal law and treaties in the complaint in anticipation of respondents' pleading, there is no Federal question involved in the case.

The prime issue in this case is—Does a Federal question exist? To determine whether one exists, one must consider the "well-pleaded complaint" rule. This rule requires that only such allegations as are required by a proper pleading to secure the remedy sought may be considered (*Taylor v. Anderson*, 234 U. S. 74 [1914]). The plaintiff may not include in a complaint matters in reply to a defense which it anticipates and thereby create a Federal question (*Gold Washing and Water Co. v. Keys*, 96 U. S. 199 [1877]).

Petitioners here seek damages for rent for the period from January 1, 1968 to December 31, 1969 relying on *United States v. Forness*, 125 F. 2d 928 (2d Cir.), cert. den. 316 U. S. 694 (1942). The Court below stated (464 F. 2d 916, 920):

"Although plaintiffs' only specific claims for relief are two years' rental value as a result of defendants'

occupancy, or damages for denial of plaintiffs' right of use, see note 3 *supra*, their success depends upon establishment of their right to possession, see *Wills v. McKinnon*, 178 N. Y. 451, 70 N. E. 962 (1904); *Crawford v. Town of Hamburg*, 19 A. D. 2d 100, 241 N.Y.S.2d 357 (1963) and the action is thus basically in ejectment." (Appellants' Appendix A-19)

The gravamen of an action in ejectment is the right to possession. Since the complaint herein as the majority, in the Court below said, is "basically in ejectment" all that needed to be pleaded is the right to possession. The inclusion of the treaties and laws of the United States is superfluous. The Indian right of occupancy arose out of their being the original occupants of the land and not out of any United States treaties or laws. Pleading them thus can only be explained as an anticipation of a defense that they have lost the right of occupancy because of the conveyance of the land in 1795 by the petitioners to the State of New York. It is through this conveyance that the respondents claim. Thus, the pleading of these laws and treaties is in anticipation of a defense and not necessary for a "well pleaded complaint".

This Court so held in *Taylor v. Anderson*, 234 U.S. 74 (*supra*), which was an ejectment action brought by an Indian in the Federal court. There the complaint also pleaded the laws and treaties of the United States in anticipation of a defense. Federal relief was denied by this Court because it determined that there was no Federal question involved. In *Taylor*, this Court said (75-76):

"It is now contended that these allegations showed that the case was one arising under the laws of the United States, namely, the acts restricting the alienation of Choctaw and Chickasaw allotments, and therefore brought it within the Circuit Court's jurisdiction. But the contention overlooks repeated decisions of this

court by which it has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute (now § 24, Judicial Code), must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose. *Tennessee v. Union and Planters' Bank*, 152 U. S. 454, 460, 464; *Third Street Railway Co. v. Lewis*, 173 U.S. 457, 460; *Florida Central Railroad Co. v. Bell*, 176 U. S. 321, 329; *Boston &c. Mining Co. v. Montana Ore Co.*, *supra*; *Joy v. St. Louis*, *supra*; *Devine v. Los Angeles*, 202 U.S. 313, 333; *Louisville & Nashville Railroad Co. v. Mottley*, 211 U. S. 149; *Shulthis v. McDougal*, 225 U.S. 561, 569; *Denver v. New York Trust Co.*, 229 U. S. 123, 133-135. Tested by this standard, as it must be, the case disclosed by the petition was not one arising under a law of the United States."

Petitioners also claim jurisdiction under 28 U. S. C. A. 1331(a), the "general Federal question jurisdiction" statute. It will be shown hereafter that there was no Federal question herein involved because of alleged violations of United States statutes and treaties in the "Indian jurisdiction" statute (28 U.S.C.A. 1362) because these laws, statutes and treaties were not necessary in a "well-pleaded complaint". For the same reason, such "general Federal questions" which were pleaded are also superfluous in a "well-pleaded complaint". Thus, if jurisdiction is absent under 28 U. S. C. A. 1362, it certainly is absent *a fortiori* under 28 U. S. C. A. 1331(a).

- B. The "well-pleaded complaint" rule is equally applicable to 28 U. S. C. A. 1331(a) and 28 U. S. C. A. 1362, and thus the complaint states no Federal question.**

The dissenting opinion of Judge LUMBARD in the Court below and Judge MURRAY's opinion (cited by appellant, Br., p. 42) in *Salt River Prima-Maricopa Indian Community v. Arizona Sand and Rock Company, an Arizona Corporation; Salt River Valley Water Users' Association, an Arizona corporation, et al.* (No. Civ. 72-376 Phx., Arizona, Dec. 11, 1972) hold that the "well-pleaded complaint" rule is applicable only to cases in which the Federal jurisdiction is dependent on 28 U. S. C. A. 1331(a). That section reads as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."
(Emphasis supplied)

Both Judge LUMBARD's and Judge MURRAY's opinions hold that the well "pleaded-complaint" rule is inapplicable to cases where jurisdiction is dependent on 28 U. S. C. A. 1362. That section reads as follows:

"§ 1362. INDIAN TRIBES

The district courts shall have original jurisdiction of all civil actions, brought by *any Indian tribe or band* with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises *under the Constitution, laws, or treaties of the United States* " (Emphasis supplied)

The wording of these two sections is identical except that one (§ 1331[a]) gives a right to sue in the Federal courts when the claim exceeds \$10,000, and the other (§ 1362) when the party bringing the action is an Indian

tribe. It is a rule of statutory construction that earlier statutes are properly considered in the construction of later statutes dealing with the same subject (New York Statutes § 222) 82 C. J. S. (Statutes § 366 states the rule as follows (p. 801):

"Statutes which relate to the same person or thing, or to the same class of persons or things, or which have a common purpose are in *pari materia*, and it is a general rule that in the construction of a particular statute, or in the interpretation of its provisions, all other statutes in *pari materia* should be read in connection with it, as together constituting one law, and they should be harmonized, if possible."

The section further states that all statutes relating to the same subject or all statutes having the same purpose are to be read in *pari materia* (82 C. J. S. [Statutes] § 366, pp. 803-804). *Crawford On Statutory Construction* 231, pp. 431-433 states:

"§ 231. STATUTES IN *PARI MATERIA*.—Statutes in *pari-materia*, that is, those which relate to the same matter or subject, although some may be special and some general, in the event one of them is ambiguous or uncertain, are to be construed together, even if the various statutes have not been enacted simultaneously, and do not refer to each other expressly, and although some of them have been repealed or have expired, or held unconstitutional, or invalid. In this connection, however, the legislative intention must not be confounded with the power of the legislature to carry that intention into effect. To refuse to give force and validity to a law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional statute is stricken out."

This Court has applied the *Pari Materia* rule in *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U. S. 39 (1939) where it said (p. 44):

"There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift was supplementary to the estate tax. The two are in *pari materia* and must be construed together. *Burnet v. Guggenheim*, *supra* [288 U. S. 280] 286."

See, also, Patent Appeal No. 5918, 195 F. 2d 303 (Court of Customs and Patent Appeals, 1952), cert. den. 344 U. S. 824, where the Court of Customs and Patents said at page 305:

"In construing a statute a court may resort to other enactments in which Congress has defined the language in issue, or otherwise explained its meaning. Such definitions, while not binding on the court, are highly persuasive, particularly when such other enactments are substantially contemporaneous with the statute involved in the case at bar."

When Congress enacted 28 U. S. C. A. 1362 with also the exact purpose as section 1331(a), both being Federal Court jurisdiction acts, the use of the same words shows the obvious intent that both should be interpreted identically.

As a matter of fact, the legislative history of 28 U. S. C. 1362 unequivocally indicates the intent of Congress to change only the jurisdictional amount limitation in actions brought by Indians. The purpose of the act as stated in Senate report 1507 (1966) is:

"PURPOSE OF BILL

"The purpose of the bill as amended is to permit Indian tribes to bring civil actions arising under the Constitution, treaties, and laws of the United States, without regard to the \$10,000 limitation, and accordingly amends chapter 85, title 28, United States Code, by adding a new section." (Emphasis supplied)

The House Report 2040 (1966) contains basically the same statement as to purpose.

The enactment appears to have been spurred by the result in *Yoder v. Assinbone* (339 F. 2d 360 [9th Cir., 1964] wherein Indians raised a Federal question but failed to satisfy the judicial tests of jurisdictional amount. Since Indian claims are frequently aggregates of many small injuries and frequently involve mineral rights of indeterminate value, the jurisdictional amount limitation was removed. The comments of the Congressional Committee and of the Justice Department clearly indicate that no further substantive change was intended. They conclude that few additional cases would be added to the Federal calendars by the elimination of only the \$10,000 requirement.

The complete reports of the Judiciary Committees of both houses of Congress are appended hereto as Appendix in order to illustrate clearly the context in which the change was enacted.

Petitioners contend that 28 U. S. C. A. 1362 should be given broad interpretation because otherwise they would have no right to any relief. It has already been shown that they either have or had a right to relief in New York State courts. Their relief, however, if they have a good cause of action, is not limited to suit in the State courts against the defendants in this action, but also against the

United States before the Indian Claims Commission. The latter since it is Oneidas' contention here that the land cessions were in violation of treaties made between the Indians and the United States Government.

In *The Seneca Nation of Indians, The Tonawanda Band of Seneca Indians v. The United States*, 173 Ct. Cl. 917 (1965),⁷ compensation was sought from the United States for damages suffered by the Indians by reason of the fact that the Federal Government failed to duly protect their land holdings; their land was sold to private purchasers. In that case the Court held there could be a claim against the United States for such land sales and sent it back to the Indian Commission to determine whether there were any damages.

If the sales or cessions to New York were in violation of the Indian Non-Intercourse Act, appellants are not without remedy but have a claim against the United States. As a matter of fact, the Court below stated that it was advised that the Oneidas had filed a claim with the Indian Claims Commission (25 U. S. C. A. § 78) because of the sale to the State of New York of lands involved in the complaint and have received an award but that the United States appealed this to the Court of Claims. If this award is affirmed by the United States Court of Claims and paid to the Indians, then a recovery here would be at least a partial duplication of damages.

⁷ It should be noted that the Court failed to reach the question of whether New York State was governed by the restrictions of the Indian Non-Intercourse Act, only holding that it was applicable to purchasers from the Indians by private parties. See also *The Six Nations, etc., et al. v. The United States*, 173 Ct. Cl. 899 (1965); *The Seneca Nations of Indians v. The United States*, 173 Ct. Cl. 912 (1963).

It follows therefore that there is no reason to negate the demonstrated Congressional intent and interpret the same words in 28 U. S. C. A. § 1331(a) and 28 U. S. C. A. § 1362 differently.

- C. New York State under New York Indian Law, §§ 5 and 11a has granted Indians and Indian tribes the capacity to sue in the instant case. Therefore, as this Court held in *Seneca v. Christy*, the matter is one for the New York State courts.

Analogous to the situation here is that in *Seneca Nations v. Christy*, 162 U. S. 283 (1896). The *Seneca* case came up through the State courts and was appealed to this Court. The New York Court of Appeals had found for the defendant for two basic reasons.⁸ First, because the Non-Intercourse Act⁹ was not applicable to New York State and, second, because of time limitations. In *Seneca Nations* this Court dismissed the writ of error on the ground that there was no Federal question, saying (pp. 289-290):

"The Seneca Nation availed itself of the act in bringing this action, which was subject to the provision, as held by the Court of Appeals, that it could only be brought and maintained 'in the same manner and within the same time as if brought by citizens of this State in relation to their private individual property and rights.' Under the circumstances, the fact that the plaintiff was an Indian tribe cannot make Federal questions of the correct construction of the act and the bar of the statute of limitations.

As it appears that the decision of the Court of Appeals was rested, in addition to other grounds, upon

⁸ 126 N. Y. 122 (1891).

⁹ The 1802 Non-Intercourse Act which was similar to the 1793 one and omitted the ban without the presence of a U. S. Commissioner on sales by Indian nations to states having the right of pre-emption of Indian lands, was the one involved.

a distinct and independent ground, not involving any Federal question, and sufficient in itself to maintain the judgment, the writ of error falls within the well settled rule on that subject and cannot be maintained".¹⁰

In *Seneca*, this Court recognized the jurisdiction of New York courts in Indian matters where the State Legislature granted the Indians capacity to sue.¹⁰

In *Seneca v. Christy*, the Senecas right to sue in New York State was by virtue of chapter 150 of the Laws of the State of New York of 1845, which permitted them to bring their action in the State courts. Chapter 150 was limited to the Seneca Indian Nation. The Oneida Nation and all other Indian tribes in New York State have the capacity to sue in its courts by virtue of New York Indian Law §§ 5 and 11a, later enacted.

As originally passed § 5 read as follows:

"§ 5. Actions in state courts

Any demand or right of action, jurisdiction of which is not conferred upon a peacemakers' court, may be prosecuted and enforced in any court of the state, the same as if all the parties thereto were citizens."

In 1902 the Commissioners of the Land Office in New York State issued an opinion signed by the New York State Attorney General based on this section, 1902 Opinions of the Attorney General, p. 400, which stated in part as to Indian Law § 5 (p. 401):

¹⁰ This Court by denying certiorari in *St. Regis v. State*, 5 N Y 2d 24 (1958), cert. den. 359 U. S. 910, rehearing den. 359 U. S. 1015 (1959), another case where the New York Court of Appeals held that Indian tribes had capacity to sue but denied relief on other grounds, upheld the rights of New York State's Courts to assume jurisdiction in Indian matters.

"This provision of law last quoted [Indian Law § 5] gives to individual Indians the right of maintaining in the Courts of Record of this State, actions of ejectment, and other proceedings for the recovery of real estate, the same as citizens enjoy, and your committee therefore advise that your honorable board has no jurisdiction in the premises."

By section 671 of the Laws of 1953, Indian Law § 5 was clarified to read as follows:

"§ 5. Actions in state courts

Any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings."

By this amendment the Indians were given the right to sue to the same extent that other citizens might sue. By New York Indian Law § 11-a (Laws of 1958, chap. 400, effective April 7, 1958), there was further clarification of the right of an Indian *nation* to sue. This law reads as follows:

"§ 11-a. Recovering possession of reservation land

In addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band of Indians may in the name and on behalf of such nation, tribe or band, maintain any action or proceeding to recover the possession of lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation."

Before the Governor signed the bill which became Chapter 400 of the Laws of 1958 (§ 11-a), he received memos from his counsel and the Comptroller of the State of New

York. These memos are included now in the billjacket¹¹ for this law. Both memos state the bill if enacted, would grant the Indians the privilege to sue in their tribal names in any action involving the recovery of or damage for reservation lands.

The main difference between the amended Indian Law § 5 and Indian Law § 11-a is that § 11-a included the "council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band" in those permitted to sue while the amended § 5 only used the term "Indians".

Petitioners note section 11-a in their brief (at page 17), stating that it must be construed with 25 U. S. C. A. 233. Section 233, which is entitled "Jurisdiction of New York State courts in civil actions" provides that the courts of New York State shall have jurisdiction in civil actions and proceedings affecting Indians or Indians and others to the same extent that they have jurisdiction in other civil actions and proceedings. It contains a statement that nothing contained in the statute shall be construed as "conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952".¹²

Section 11-a was not passed at about the same time as 25 U. S. C. A. 233 as petitioners contend. It was the

¹¹ The billjacket in New York State is the Governor's file containing all memoranda sent to him at the time a bill is before him for signature.

¹² It should be noted that damages sought here were for the period from January 1, 1968 to December 31, 1969. The complaint's prayer for "such other relief" could only be for the period subsequent to that complaint. Thus, even under 25 U. S. C. A. 233, New York State has jurisdiction in the instant matter.

amended Indian Law § 5 which was enacted at about that time (1953). Section 11-a was enacted five years later in 1958.

There was a Memorandum to the Governor contained in the 1953 billjacket for the amended § 5, signed by Nathaniel L. Goldstein, the then Attorney General of the State of New York, which contained the following:

"The bills will not take away any jurisdiction [sic] from the peacemakers courts, but will give the State courts concurrent jurisdiction. This step is authorized by Congress, if such authority was needed by its Act of September 13, 1950 (64 Stat. 845, 25 U. S. C. § 233)."

The New York State Legislature by amended § 5 did not limit the actions which could be brought by Indians to those arising after September 13, 1952. Neither did § 11-a contain such a limitation. By clear language both §§ 5 and 11-a remove any doubt that Indian nations have a right to sue in New York State courts regardless of when the cause of action accrued.

Thus, while 25 U. S. C. A. 233 states that it does confer jurisdiction on New York State courts in matters which accrued prior to September 13, 1952, New York's own statutes, Indian Law §§ 5 and 11-a, gave the Indians and Indian Nations of the State capacity to sue irrespective of the date of the accrual of their cause of action, including those accruing prior to September 13, 1952 and also those which accrued thereafter.

In their brief, petitioners rely greatly on *United States v. Forness, supra*, 125 F. 2d 928 (2d Cir.), cert. den. 316 U. S. 694 (1942). The Congressional Record, August 14, 1950, containing portions of the debate on the bill which because 25 U. S. C. A. 233 has a statement by Representative O'Sullivan of Nebraska, an opponent of the bill, that

the bill was being enacted to overcome *U. S. v. Forness*, Mr. O'Sullivan said:

"This decision rendered by the circuit court of appeals in the case of *United States v. Forness* (125 Fed. 2d 928), decided in 1942, upset the general theory of the New York State lawyers and in substance held clearly that the claims and rights of the Indians were established clearly by treaties, and that a treaty, like the gentleman from New York [Mr. REED] has stated, along with the Constitution, is the supreme law of the land.

Then immediately these bills resembling S. 192, began to come into being. Since the year 1943 in about every session of the Congress bills like this S. 192, or similar bills were introduced but not one of them got by the scrutinizing eye of the Congress.

"The sponsors of such bills, it appears to me, are great believers in the old blurb, 'If at first you don't succeed, try, try again.'"

The bill, however, was passed and whatever adverse effects *United States v. Forness*, *supra*, might have had on the jurisdiction of New York courts over the Indians was removed.

It follows therefore that the petitioners herein had capacity to sue in New York State.

- D. Assuming petitioners have a concurrent right to sue in the Federal and State courts, Federal courts should exercise the doctrine of abstention since any decision made either in the Federal or State courts would involve an interpretation of the New York State Statute of Limitations.**

In any event §§ 5 and 11-a of the New York State Indian Law gave the Indians the capacity to sue in State courts so that they have a forum. Capacity to sue does not mean that there is no defense to their actions. The Statute of Limitations is a potential defense to their cause of action here. This, however, is no reason why they should be given a right to sue in the Federal courts and certainly the same Statute of Limitations would, if a bar to an action in the State courts, also be one in the Federal courts. See *Seneca Nations v. Christy*, 162 U. S. 283, *supra*.

This Court held in *Seneca* that there was no Federal question. In that case the New York Court of Appeals held that the Seneca Nation had the capacity to sue. Since the statute granting them this right limited it to the same extent as other people might sue, the Senecas were barred by the New York State Statute of Limitations just as any other litigant would be under similar circumstances. Here, too, both sections 5 and 11a of the New York State Indian Law contain limitations similar to that in the *Seneca* case. Therefore, the New York State Statute of Limitations would have to be considered. Since this is a purely New York question and, at most, Federal courts would have concurrent jurisdiction in this case, it is a proper one for Federal courts to invoke the doctrine of abstention and permit New York State courts to decide their own law. *Harrison v. NAACP*, 360 U. S. 167 (1959). In that case this Court said (pp. 176-177):

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U. S. 521, 525, as their 'contribution . . . in furthering the harmonious relation between state and federal authority . . . ' *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. See, e.g., *Railroad Comm'n, v. Pullman Co.*, *supra*; *Chicago v. Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101; *American Federation of Labor v. Watson*, 327 U. S. 582; *Shipman v. DuPre*, 339 U. S. 321; *Albertson v. Millard*, 345 U. S. 242; *Government & Civic Employees v. Windsor*, 353 U. S. 364. This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

See, also, *Reetz v. Bozanich*, 397 U. S. 82 (1970).

It follows, therefore, that even if the Federal courts have concurrent jurisdiction, this is a proper case to exercise the doctrine of abstention.

CONCLUSION

The Order and Judgment of the court below should be affirmed.

Dated: August 14, 1973.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for State of New York
Amicus Curiae

RUTH KESSLER TOCH
Solicitor General of the State
of New York

JEREMIAH JOCHNOWITZ
Assistant Attorney General of the State
of New York

CONCLUSION

The Order and Judgment of the court below should be

affirmed.

Very respectfully,

Wm. H. H. H. H.

Attorney at Law

Office of the

County of

State of

Witness my hand and seal of office this

day of

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at

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APPENDIX
Legislative Reports

Calendar No. 1473

89TH CONGRESS

2d Session

SENATE

REPORT
No. 1507

**PERMITTING INDIAN TRIBES TO MAINTAIN CIVIL
ACTIONS IN FEDERAL DISTRICT COURTS WITH-
OUT REGARD TO \$10,000 LIMITATION**

AUGUST 24, 1966.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 1356]

The Committee on the Judiciary, to which was referred the bill (S. 1356) to amend title 28, United States Code, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

AMENDMENTS

1. Page 1, line 4, strike "1360" and insert in lieu thereof "1361".
2. Page 1, line 5, strike "1361" and insert in lieu thereof "1362".
3. Page 1, line 6, strike "1361" and insert in lieu thereof "1362".

Legislative Reports

4. Page 1, after line 11, insert a new section 2:

SEC. 2. The Chapter Analysis of Chapter 85 of title 28 of the United States Code is amended by adding at the end thereof the following new item:

"§ 1362. Indian tribes."

PURPOSE OF AMENDMENTS

The previous section number assigned, 1361, is already in use, and the proposed section must be renumbered as 1362.

PURPOSE OF BILL

The purpose of the bill as amended is to permit Indian tribes to bring civil actions arising under the Constitution, treaties, and laws of the United States, without regard to the \$10,000 limitation, and accordingly amends chapter 85, title 28, United States Code, by adding a new section.

STATEMENT

The Department of the Interior and the Judicial Conference of the United States have recommended that this bill pass. The Department of Justice declines to take a position on the bill, observing that it is a matter of policy upon which it is not appropriate for the Department to take a position. The Department of Justice points out, however, that there is no reason to believe that the number of cases which might result from the expansion of jurisdiction would be very large.

At hearings on this bill held by the Subcommittee on Improvements in Judicial Machinery, Senator Quentin N.

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Burdick, author of the bill, testified in its behalf. The Senator's statement was substantially confirmed by Mr. Richmond Allen, Associate Solicitor in charge of Indian affairs for the Department of the Interior, and by Marvin Sonosky, Esq., an attorney speaking on behalf of some half-dozen Indian tribes. In substance, the proponents of this bill indicate that the jurisdictional limitation works an especial hardship on Indian tribes. In many instances claims arise under special treaties between the United States and the tribes, but because of the limitation the matter cannot be litigated in Federal courts. As an example, several parcels of land may be claimed by the tribes, each of the parcels being valued at under \$10,000, even though the aggregate constitutes more than \$10,000. However, these claims may not be added together for the purpose of meeting the jurisdictional amount, and the tribes are denied a Federal forum.

There is great hesitancy on the part of tribes to use State courts. This reluctance is founded partially on the traditional fear that tribes have had of the States in which their reservations are situated. Additionally, the Federal courts have more expertise in deciding questions involving treaties with the Federal Government, as well as interpreting the relevant body of Federal law that has developed over the years.

Currently, the right of the Attorney General of the United States to bring civil actions on behalf of tribes without regard to jurisdictional amount, a power conferred on him by special statutes, is insufficient in those cases wherein the interest of the Federal Government as guardian of the Indian tribes and as Federal sovereign conflict, in which case the Attorney General will decline to bring the action.

Legislative Reports

The proposed legislation will remedy these defects by making it possible for the Indian tribes to seek redress using their own resources and attorneys.

After a study of all of the foregoing the committee is of the opinion that this legislation is meritorious, and recommends that the bill S. 1356, as amended, be considered favorably.

Attached hereto and made a part hereof are the reports of the Department of the Interior, the Department of Justice, and the Judicial Conference of the United States.

U. S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D. C., December 22, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This responds to your request for a report on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes.

We recommend that the bill be enacted.

The bill removes the \$10,000 jurisdictional limitation upon civil litigation in the U. S. district courts by Indian tribes when the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Judicial Conference has endorsed the bill on the grounds that (1) it presents no difficulty of judicial ad-

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ministration, and (2) it is in line with recently enacted statutes conferring Federal question jurisdiction without regard to the amount of money involved. We concur in that view.

In addition, it is particularly appropriate to remove the \$10,000 limitation with respect to litigation involving tribal lands that are or were held by the United States in trust for the tribe, or by the tribe subject to a restriction against, alienation imposed by the United States. The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts.

It should be noted that the United States as trustee can initiate the litigation in the Federal courts, and often does so. Occasionally, however, the U. S. attorney declines to bring an action, and the tribes should then have access to the Federal courts through their own attorneys.

The new section added to the title 28 of the United States Code should be section 1362 rather than section 1361.

We also suggest that the bill should add the new section 1362 to the table of contents for chapter 85 that precedes section 1331.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

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ADMINISTRATIVE OFFICE OF THE U. S. COURTS,
SUPREME COURT BUILDING,
Washington, D. C., October 1, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This is in further reply to your request of March 11, 1965, for the views of the Judicial Conference of the United States on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes.

At its recent session on September 22-23, 1965, the Judicial Conference voted to approve this legislation. The Conference believes that the elimination of the \$10,000 jurisdictional limitation upon civil litigation of Indian tribes would present no difficulty of judicial administration and would be in line with the more recently enacted statutes conferring Federal question jurisdiction which do not contain a monetary limitation.

It should be noted that the proposed section 1361 of title 28 of S. 1356 should be numbered 1362 as the previous number is already in use.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

Legislative Reports

U. S. DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., March 4, 1966.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes.

Under existing law the district courts have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States (28 U. S. C. 1331[a]). The \$10,000 jurisdictional amount is, of course, not applicable to actions brought in the name of the United States to enforce rights of Indian tribes arising under the Constitution, laws, or treaties of the United States (28 U. S. C. 1345). The bill would amend the Judicial Code by adding a new section under which the district courts would be vested with original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The effect of the bill would be to remove insofar as actions brought by Indian tribes are concerned, the \$10,000 limitation provided in section 1331(a) of title 28 and thus permit them to maintain actions in the U. S. courts without

Legislative Reports

any limitation on the amount in controversy, where the case arises under the Constitution, laws, or treaties of the United States. One of the purposes of the bill apparently is to overcome the effect of the decision in the case of *Yoder v. Assiniboine and Sioux Tribes*, 339 F. 2d 360 (1964) which held that the Federal courts did not have jurisdiction of an action brought by the Indian tribes involving oil and gas well spacing on tribal lands because the tribes failed to show that the jurisdictional amount of \$10,000 was involved.

As indicated above the *Yoder* case involved the power of a State to control oil and gas well spacing on Indian lands. Other suits which might be brought in the Federal courts under the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes under the Constitution, laws, or treaties of the United States and actions for the protection of powers of tribal self-government. While an accurate estimate cannot be made of the number of cases which might result from the enactment of the bill, there is no reason to believe the number would be large.

Whether the bill should be enacted involves questions of policy on which the Department of Justice prefers to make no recommendation. However, if the bill is to receive favorable consideration it is suggested that since there presently is a section 1361 of title 28, United States Code (Public Law 87-748; 76 Stat. 744) the bill should be amended by substituting "1361" for "1360" on line 4 and by substituting "1362" for "1361" on line 5 and again on line 6 of the bill.

Legislative Reports

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

CHAPTER 85, TITLE 28, UNITED STATES CODE

§ 1361. . . .

“§ 1362. *Indian tribes.*

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

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Legislative Reports

HOUSE OF REPRESENTATIVES

89TH CONGRESS
2d Session

REPORT
No. 2040

AMENDING THE JUDICIAL CODE TO PERMIT
INDIAN TRIBES TO MAINTAIN CIVIL ACTIONS
IN FEDERAL DISTRICT COURTS WITHOUT RE-
GARD TO THE \$10,000 LIMITATION, AND FOR
OTHER PURPOSES

SEPTEMBER 12, 1966.—Committed to the Committee of the
Whole House on the State of the Union and
ordered to be printed

Mr. McCLORY, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 1356]

The Committee on the Judiciary, to whom was referred the bill (S. 1356) to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Legislative Reports

PURPOSE

The purpose of the proposed legislation is to provide that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. These civil actions would therefore be permitted without regard to the \$10,000 jurisdictional amount provided in section 1331(a) of title 28, when brought by an Indian tribe or band under the authority of the new section added by the bill.

STATEMENT

The Department of the Interior in its report to the Senate committee recommended the enactment of the bill. The Department of Justice made no recommendation as to the bill, and the administrative office of the U. S. court in behalf of the Judicial Conference stated that the Judicial Conference in its September 1965 session voted to approve the legislation.

By adding a new section 1362 to chapter 85 of title 28 of the United States Code, the bill would add language to that title making it possible for an Indian tribe or band having a governing body recognized by the Secretary of the Interior to bring actions in a district court where the matter in controversy arises under the Constitution, laws, or treaties of the United States. In providing for original jurisdiction of all civil actions of this type, the bill has the effect of removing the \$10,000 jurisdictional requirement which presently applies as to such actions by reason of the provisions of section 1331 of the same chapter of title

Legislative Reports

28. The district courts now have jurisdiction over cases presenting Federal questions brought by the tribes when the amount in dispute exceeds \$10,000. Enactment of this bill would merely authorize the additional jurisdiction of the court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount. In its report to the Senate Committee, the Department of the Interior specifically pointed out that the issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues. The Department therefore observed that particularly as to this class of cases it is appropriate that the actions be brought in a U. S. district court. In its statement to the Senate committee, that Department referred to the unique governmental status of Indian tribes that the unique relationship which exists between them and the Federal Government. This is a relationship often affected by treaties and the Department of the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified.

The report of the Department of Justice referred to the case of *Yoder v. Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.* (339 F. 2d 360 (1964)), and the committee feels that this case serves to exemplify the difficulties encountered by Indian tribes in connection with the type of litigation which would be governed by the new section 1362 added to the law by this bill. In that case, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Mont., sought to enjoin the enforcement of a State order attempting to pool the lands owned

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by the tribes with the lands of another to form a "spacing unit" in connection with the drilling of an oil and gas well. The tribes were successful in the district court. However, on appeal to the U. S. Court of Appeals for the Ninth Circuit, the case was reversed on jurisdictional grounds because of the difficulty in establishing the amount in controversy as more than \$10,000. The incongruity of this situation is pointed up by the fact that, traditionally the matters concerning Indian lands under trust allotments fall within the exclusive control of the Federal Government. The judicial determination of controversies concerning such lands commonly is committed to the Federal courts. *Minnesota v. United States*, 305 U. S. 382 (1938).

The committee feels that there is another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill. The United States as trustee can initiate litigation involving issues identical to those which would be presented in cases brought under the new section. The enactment of this bill would provide for U. S. district court jurisdiction in those cases where the U. S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues.

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In his statement before the Senate committee, the representative of the Department of Interior stated that it was the Department's view that the creation of the jurisdiction contemplated by the bill will not add appreciably to the burdens of the Federal courts. As has been noted, these courts now entertain cases brought by the Federal Government to vindicate tribal rights without regard to the amount in controversy. Further, they now entertain cases presenting Federal questions brought by the tribes when the amount in dispute exceeds \$10,000. This bill would therefore authorize the addition of only those cases, which the Justice Department stated would probably not be large in number, where the tribes have not been able to show that the amount in controversy exceeds \$10,000, and the Government for some reason does not want to prosecute the case in behalf of the tribe. The Judicial Conference in commenting on this type of case has stated that the jurisdiction contemplated by the bill would present no difficulty of judicial administration.

In view of the matters discussed above, and the favorable position of the Department of the Interior and the Judicial Conference on the United States, the committee recommends that the bill be considered favorably.

Attached hereto and made a part hereof are the reports to the Senate committee of the Department of the Interior, the Department of Justice, and the Judicial Conference of the United States:

Legislative Reports

U. S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., December 22, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This responds to your request for a report on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes.

We recommend that the bill be enacted.

The bill removes the \$10,000 jurisdictional limitation upon civil litigation in the U. S. district courts by Indian tribes when the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The Judicial Conference has endorsed the bill on the grounds that (1) it presents no difficulty of judicial administration and (2) it is in line with recently enacted statutes conferring Federal question jurisdiction without regard to the amount of money involved. We concur in that view.

In addition, it is particularly appropriate to remove the \$10,000 limitation with respect to litigation involving tribal lands that are or were held by the United States in trust for the tribe, or by the tribe subject to a restriction against, alienation imposed by the United States. The issues involved are Federal issues and the tribes should not be required to conduct the litigation in the State courts.

Legislative Reports

It should be noted that the United States as trustee can initiate the litigation in the Federal courts, and often does so. Occasionally, however, the U. S. attorney declines to bring an action, and the tribes should then have access to the Federal courts through their own attorneys.

The new section added to title 28 of the United States Code should be section 1362 rather than section 1361.

We also suggest that the bill should add the new section 1362 to the table of contents for chapter 85 that precedes section 1331.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

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Legislative Reports

ADMINISTRATIVE OFFICE OF THE U. S. COURTS,
SUPREME COURT BUILDING,
Washington, D. C., October 1, 1965.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR EASTLAND: This is in further reply to request of March 14, 1965, for the views of the Judicial Conference of the United States on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes.

At its recent session on September 22-23, 1965, the Judicial Conference voted to approve this legislation. The Conference believes that the elimination of the \$10,000 jurisdictional limitation upon civil litigation of Indian tribes, would present no difficulty of judicial administration and would be in line with the more recently enacted statutes conferring Federal question jurisdiction which do not contain a monetary limitation.

It should be noted that the proposed section 1361 of title 28 of S. 1356 should be numbered 1362 as the previous number is already in use.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

Legislative Reports

U. S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., March 4, 1966.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U. S. Senate, Washington, D. C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1356, a bill to amend the Judicial Code to permit Indian tribes to maintain civil actions in Federal district courts without regard to the \$10,000 limitation, and for other purposes.

Under existing law the district courts have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States (28 U. S. C. 1331(a)). The \$10,000 jurisdictional amount is, of course, not applicable to actions brought in the name of the United States to enforce rights of Indian tribes arising under the Constitution, laws or treaties of the United States (28 U. S. C. 1345). The bill would amend the Judicial Code by adding a new section under which the district courts would be vested with original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

The effect of the bill would be to remove insofar as actions brought by Indian tribes are concerned, the \$10,000 limitation provided in section 1331(a) of title 28 and thus

Legislative Reports

permit them to maintain actions in the U. S. courts without any limitation on the amount in controversy, where the case arises under the Constitution, laws, or treaties of the United States. One of the purposes of the bill apparently is to overcome the effect of the decision in the case of *Yoder v. Assiniboine and Sioux Tribes*, 339 F. 2d 360 (1964) which held that the Federal courts did not have jurisdiction of an action brought by the Indian tribes involving oil and gas well spacing on tribal lands because the tribes failed to show that the jurisdictional amount of \$10,000 was involved.

As indicated above, the *Yoder* case involved the power of a State to control oil and gas well spacing on Indian lands. Other suits which might be brought in the Federal courts under the bill would include actions to quiet title to land claimed by Indian tribes, including actions to set aside patents where it is alleged the patents infringe upon rights claimed by the tribes under the Constitution, laws, or treaties of the United States and actions for the protection of powers of tribal self-government. While an accurate estimate cannot be made of the number of cases which might result from the enactment of the bill, there is no reason to believe the number would be large.

Whether the bill should be enacted involves questions of policy on which the Department of Justice prefers to make no recommendation. However, if the bill is to receive favorable consideration it is suggested that since there presently is a section 1361 of title 28, United States Code (Public Law 87-748; 76 Stat. 744) the bill should be amended

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by substituting "1361" for "1360" on line 4 and by substituting "1362" for "1361" on line 5 and again on line 6 of the bill.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

Legislative Reports

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28, UNITED STATES CODE

CHAPTER 85.—DISTRICT COURTS; JURISDICTION

Sec.

• • • • •
1362. *Indian tribes*

• • • • •
“§ 1362. *Indian tribes*

“The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.”

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Supreme Court, U. S.
FILED

No. **72 - 851**

SEP 10 1973

MICHAEL RONAN, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1973.

THE ONEIDA INDIAN NATION OF NEW YORK
STATE, also known as THE ONEIDA NATION OF NEW
YORK, also known as THE ONEIDA INDIANS OF NEW
YORK, and THE ONEIDA INDIAN NATION OF
WISCONSIN, also known as THE ONEIDA TRIBE OF
INDIANS OF WISCONSIN, Inc.,

Petitioners,

vs.

THE COUNTY OF ONEIDA, NEW YORK, and THE
COUNTY OF MADISON, NEW YORK,

Respondents.

**BRIEF FOR THE RESPONDENT, THE COUNTY OF
ONEIDA, NEW YORK.**

RAYMOND M. DURR,
*Attorney for Respondent, The County
of Oneida, New York,*
800 Park Avenue,
Utica, N. Y. 13501
(315) 798-5910.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973.

No.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the Oneida Tribe of Indians of Wisconsin, Inc.,

Petitioners,

v.

THE COUNTY OF ONEIDA, NEW YORK, and THE COUNTY OF MADISON, NEW YORK,

Respondents.

BRIEF FOR THE RESPONDENT, THE COUNTY OF ONEIDA.

Questions Presented.

I. Does the "well-pleaded complaint" rule apply to the "arising under" language of 28 U.S.C. §1362?

II. Does an action which is basically a State action in ejectment present a Federal question albeit plaintiffs' claim of right or title is founded on a Federal statute, patent or treaty?

Argument.

The sole issue before this court is whether the "well-pleaded complaint" rule previously applied to 28 U.S.C. 1331 is also to be applied to 28 U.S.C. 1362.

It is clear that the latter statute was passed in the wake of *Yoder v. Assiniboine and Sioux Tribes of Fort Peck Indian Reservation, Mont.*, 339 F. 2d 360 (9th Cir. 1964), and the specific intent of Congress was to remove the jurisdictional amount contained in 28 U.S.C. 1331.

Federal District Courts have jurisdiction over cases presenting a Federal question and involving an amount for more than \$10,000.

The House report No. 2040 in 1966 U. S. Code Cong. & Adm. News at page 3146 sets forth that the "enactment of this bill would merely authorize the additional jurisdiction of the Court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount."

The court below, in the opinion of Chief Judge Friendly in 464 Fed. 2d 916 at page 920, states that appellants must show right to possession first since their action is one in ejectment. "As to this a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no Federal question even when a plaintiff's claim of right of title is founded on a Federal statute, patent or treaty."

Judge Friendly cited *Taylor v. Anderson*, 234 U. S. 74 (1914), as being directly in point. The defendants in that case asserted ownership in themselves under a certain deed that was void under legislation of Congress restrict-

ing alienation of lands allotted to the Choctaw and Chickasaw Indians. 234 U. S. at 74-75. This was held not to state a claim arising under the laws of the United States, since all that needed to be alleged was "that the plaintiffs were owners in fee and entitled to the possession; that the defendants had forcibly taken possession and were wrongfully keeping the plaintiffs out of possession, and that the latter were damaged thereby in the sum named." *Id.* at 74. The court noted that jurisdiction "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of (*sic*) avoidance of defenses which it is thought the defendant may interpose." *Id.* at 75-76.

CONCLUSION.

The appeal should be dismissed.

Respectfully submitted,

RAYMOND M. DURR,
Attorney for Respondent,
The County of Oneida, New York,
800 Park Avenue,
Utica, N. Y. 13501,
Tel.: (315) 798-5910.

Syllabus

ONEIDA INDIAN NATION OF NEW YORK ET AL.
v. COUNTY OF ONEIDA, NEW YORK, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 72-851. Argued November 6-7, 1973—Decided January 21, 1974

Petitioners brought this action for the fair rental value for a specified period of certain land in New York that the Oneidas had ceded to the State in 1795, alleging, *inter alia*, that the Oneidas had owned and occupied the land from time immemorial to the time of the American Revolution; that in the 1780's and 1790's various treaties with the United States had confirmed their right to possession of the land until purchased by the United States; that in 1790 the treaties had been implemented by the Nonintercourse Act forbidding the conveyance of Indian lands without the United States' consent; and that the 1795 cession was without such consent and hence ineffective to terminate the Oneidas' right to possession under the treaties and applicable federal statutes. The District Court, ruling that the action arose under state law, dismissed the complaint for failure to raise a question arising under the laws of the United States within the meaning of either 28 U. S. C. § 1331 or 28 U. S. C. § 1362. The Court of Appeals, relying on the "well-pleaded complaint rule" of *Taylor v. Anderson*, 234 U. S. 74, affirmed and held that although the decision would ultimately depend on whether the 1795 cession complied with the Nonintercourse Act, and what the consequences would be if it did not, this alone did not establish "arising under" jurisdiction because the federal issue was not one of the necessary elements of the complaint, which essentially sought relief based on the right to possession of real property. *Held*: The complaint states a controversy arising under the Constitution, laws, or treaties of the United States sufficient to invoke the jurisdiction of the District Court under 28 U. S. C. §§ 1331 and 1362. Pp. 666-682.

(a) Petitioners asserted a current right to possession conferred by federal law, wholly independent of state law, the threshold allegation required of such a well-pleaded complaint—the right to possession—being plainly enough alleged to be based on federal law so that the federal law issue did not arise solely in anticipation of a defense. Pp. 666, 677.

Syllabus

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(b) Petitioners' claim of a federal right to possession governed wholly by federal law is not so insubstantial or devoid of merit as to preclude a federal controversy within the District Court's jurisdiction, regardless of how the federal issue is ultimately resolved. Pp. 666-667.

(c) Indian title is a matter of federal law and can be extinguished only with federal consent. Pp. 670-674.

(d) This is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation. *Gully v. First National Bank*, 299 U. S. 109, distinguished. Pp. 675-676.

(e) In sustaining the District Court's jurisdiction, the well-pleaded complaint rule of *Taylor v. Anderson*, *supra*, is not disturbed, since here the right to possession itself is claimed to arise under federal law in the first instance, and allegedly aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. P. 676.

(f) The complaint satisfies the requirement that it reveal a dispute or controversy respecting the validity, construction, or effect of a federal law, upon the determination of which the result depends. Pp. 677-678.

(g) The conclusion that this case arises under the laws of the United States comports with the language and legislative history of 25 U. S. C. § 233 granting to New York civil jurisdiction over disputes between Indians or between Indians and others. Pp. 678-682.

464 F. 2d 916, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 682.

George C. Shattuck argued the cause and filed a brief for petitioners.

William L. Burke argued the cause for respondents and filed a brief for respondent County of Madison. *Raymond M. Durr* filed a brief for respondent County of Oneida.

Jeremiah Jochowitz, Assistant Attorney General, argued the cause for the State of New York as *amicus*

curiae urging affirmance. With him on the brief were Louis J. Lefkowitz, Attorney General, and Ruth Kessler Toch, Solicitor General.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Both §§ 1331 and 1362 of Title 28 of the United States Code confer jurisdiction on the District Courts to hear cases "aris[ing] under the Constitution, laws, or treaties of the United States."¹ Section 1331 requires that the amount in controversy exceed \$10,000. Under § 1362, Indian tribes may bring such suits without regard to the amount in controversy. The question now before us is whether the District Court had jurisdiction over this case under either of these sections.

I

The complaint was filed in the United States District Court for the Northern District of New York by the Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin against the Counties of Oneida and Madison in the State of New York.² The

*Arthur Lazarus, Jr., filed a brief for the Association on American Indian Affairs, Inc., et al. as *amici curiae* urging reversal.

¹ Section 1331 (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Under § 1362:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

² Initially, only diversity jurisdiction under 28 U. S. C. § 1332 was alleged in the complaint. The necessary jurisdictional amount

complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 1780's and 1790's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States³ and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the

was averred. Federal question jurisdiction was asserted by an amendment to the complaint. Jurisdiction under § 1332 was rejected by the District Court and the Court of Appeals and is not at issue here.

³ Three treaties with the Six Indian Nations of the Iroquois Confederacy in New York were alleged: the Treaty of Fort Stanwix of 1784, which provides in part that "[t]he Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled"; The Treaty of Fort Harmar of 1789 where the Oneida and the Tuscarora nations were "again secured and confirmed in the possession of their respective lands"; and the Treaty of Canandaigua of 1794, Art. II of which provides: "The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." The treaties referred to are found at 7 Stat. 15, 7 Stat. 33, and 7 Stat. 44, respectively.

Indians' right to possession under the federal treaties and the applicable federal statutes. Also alleging that the 1795 cession was for an unconscionable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1968, through December 31, 1969.

The District Court ruled that the cause of action, regardless of the label given it, was created under state law and required only allegations of the plaintiffs' possessory rights and the defendants' interference therewith. The possible necessity of interpreting a federal statute or treaties to resolve a potential defense was deemed insufficient to sustain federal question jurisdiction. The complaint was accordingly dismissed for want of subject matter jurisdiction for failure of the complaint to raise a question arising under the laws of the United States within the meaning of either § 1331 or § 1362.

The Court of Appeals affirmed, with one judge dissenting, ruling that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule for determining federal question jurisdiction." 464 F. 2d 916, 918 (CA2 1972). Although "[d]ecision would ultimately turn on whether the deed of 1795 complied with what is now 25 U. S. C. § 177 and what the consequences would be if it did not," *id.*, at 919, this alone did not establish "arising under" jurisdiction because the federal issue was not one of the necessary elements of the complaint, which was read as essentially seeking relief based on the right to possession of real property. The Court of Appeals thought *Taylor v. Anderson*, 234 U. S. 74 (1914), directly in point. There, a complaint in ejectment did not state a claim arising under the laws of the United States even though it alleged that the defendants were claiming under a deed that was void under acts of Congress restraining

the alienation of lands allotted to Choctaw and Chickasaw Indians. The Court applied the principle that whether a case arises under federal law for purposes of the jurisdictional statute "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Id.*, at 75-76. Because the only essential allegations were plaintiffs' rights to possession, defendants' wrongful holding and the damage claim, the complaint did not properly assert a federal issue, however likely it might be that it would be relevant to or determinative of a defense. In the present case, noting that the District Judge was correct in holding that under New York law these allegations would suffice to state a cause of action in ejectment, the Court of Appeals considered *Taylor* to be dispositive.

Both the District Court and the Court of Appeals were in error, and we reverse the judgment of the Court of Appeals.

II

Accepting the premise of the Court of Appeals that the case was essentially a possessory action, we are of the view that the complaint asserted a current right to possession conferred by federal law, wholly independent of state law. The threshold allegation required of such a well-pleaded complaint—the right to possession—was plainly enough alleged to be based on federal law. The federal law issue, therefore, did not arise solely in anticipation of a defense. Moreover, we think that the basis for petitioners' assertion that they had a federal right to possession governed wholly by federal law cannot be said to be so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be

the ultimate resolution of the federal issues on the merits. See, e. g., *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913); *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 130 (1906); *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 105-106 (1933); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951). Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362.

It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that “no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any

state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."⁴ This has remained the policy of the United States to this day. See 25 U. S. C. § 177.

In *United States v. Santa Fe Pacific R. Co.*, 314 U. S. 339, 345 (1941), a unanimous Court succinctly summarized the essence of past cases in relevant respects:

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' *Cramer v. United States*, 261 U. S. 219, 227. This policy was first recognized in *Johnson v. M'Intosh*, 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester v. Georgia*, 6 Pet. 515; *Mitchel v. United States*, 9 Pet. 711; *Chouteau v. Molony*, 16 How. 203; *Holden v. Joy*, 17 Wall. 211; *Buttz v. Northern Pacific Railroad*[, 119 U. S. 55]; *United States v. Shoshone Tribe*, 304 U. S. 111. As stated in *Mitchel v. United States*, *supra*, p. 746, Indian 'right of occu-

⁴ Section 4 of the Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." The second Nonintercourse Act passed in 1793 made it a misdemeanor to negotiate for Indian lands without federal authority, but it was made lawful for state agents who were present at any treaty held with the Indians under the authority of the United States, in the presence and with the approbation of the United States Commissioner, "to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty." 1 Stat. 329, 330-331 § 8. This statutory policy, without major change, was carried forward in § 12 of the 1796 Act, 1 Stat. 469, 472; § 12 of the 1799 Act, 1 Stat. 743, 746; § 12 of the 1802 Act, 2 Stat. 139, 143; § 12 of the Act of 1834, 4 Stat. 729, 730-731; and in Rev. Stat. § 2116, now 25 U. S. C. § 177.

pancy is considered as sacred as the fee simple of the whites.' "

The *Santa Fe* case also reaffirmed prior decisions to the effect that a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." *Id.*, at 347. Tribal rights were nevertheless entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the "power of Congress . . . is supreme." *Ibid.*

As indicated in *Santa Fe*, the fundamental propositions which it restated were firmly rooted in earlier cases. In *Johnson v. M'Intosh*, 8 Wheat. 543 (1823), the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775; those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government. The land in question, when ceded to the United States by the State of Virginia, was "occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted." *Id.*, at 586. See also *id.*, at 591-597, 603. The possessory and treaty rights of Indian tribes to their lands have been the recurring theme of many other cases.⁵

⁵ Representative of almost countless cases are *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831); *United States v. Rogers*, 4 How. 567 (1846); *The Kansas Indians*, 5 Wall. 737 (1866); *The New York Indians*, 5 Wall. 761 (1867); *Holden v. Joy*, 17 Wall. 211 (1872); *Beecher v. Wetherby*, 95 U. S. 517 (1877); *United States v. Kagama*, 118 U. S. 375 (1886); *Spalding v. Chandler*, 160 U. S. 394 (1896); *United States v. Sandoval*, 231 U. S. 28 (1913); *Nadeau v. Union Pacific R. Co.*, 253 U. S. 442 (1920); *Minnesota v. United States*, 305 U. S. 382 (1939); *United States v. Tillamooks*, 329 U. S. 40 (1946); *Tee-Hit-Ton Indians v. United States*, 348 U. S. 272 (1955). U. S. Dept. of Interior, Federal Indian Law 32-43, 583-645,

The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87 (1810).^{*} But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

For example, in *Worcester v. Georgia*, 6 Pet. 515 (1832), the State of Georgia sought to prosecute a white man for residing in Indian country contrary to the laws of the State. This Court held the prosecution a nullity, the Chief Justice referring to the treaties with the Cherokees and to the

"universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent: that their territory was separated from that of any state within whose chartered limits they might reside, by a boundary

675-687 (1958) (hereinafter Federal Indian Law), sets out some of the fundamentals of the law dealing with Indian possessory rights to real property stemming from aboriginal title, treaty, and statute.

^{*} See also *Cherokee Nation v. Georgia*, *supra*, at 38; *Clark v. Smith*, 13 Pet. 195 (1839); *Lattimer v. Poteet*, 14 Pet. 4 (1840); *Seneca Nation v. Christy*, 162 U. S. 283 (1896). "Outside of the territory of the original colonies, the ultimate fee is located in the United States and may be granted to individuals subject to the Indian right of occupancy." Federal Indian Law 599; *Missouri v. Iowa*, 7 How. 660 (1849).

line, established by treaties: that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States." *Id.*, at 560.

The Cherokee Nation was said to be occupying its own territory "in which the laws of Georgia can have no force" The Georgia law was declared unconstitutional because it interfered with the relations "between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union." *Id.*, at 561.

There are cases of similar import with respect to the New York Indians. These cases lend substance to petitioners' assertion that the possessory right claimed is a federal right to the lands at issue in this case. *Fellows v. Blacksmith*, 19 How. 366, 372 (1857), which concerned the Seneca Indians, held that the "forcible removal [of Indians] must be made, if made at all, under the direction of the United States [and] that this interpretation is in accordance with the usages and practice of the Government in providing for the removal of Indian tribes from their ancient possessions." In *The New York Indians*, 5 Wall. 761 (1867), the State sought to tax the reservation lands of the Senecas. The Court held the tax void. The Court referred to the Indian right of occupancy as creating "an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption," *id.*, at 771, and noted that New York "possessed no power to deal with Indian rights or title," *id.*, at 769. Of major importance, however, was the treaty of 1794 in which the United States acknowledged

certain territory to be the property of the Seneca Nation and promised that "it shall remain theirs until they choose to sell the same to the people of the United States" *Id.*, at 766-767. The rights of the Indians to occupy those lands "do not depend on . . . any . . . statutes of the State, but upon treaties, which are the supreme law of the land; it is to these treaties we must look to ascertain the nature of these rights, and the extent of them." *Id.*, at 768.⁷ The State's attempt to tax reservation lands was invalidated as an interference with Indian possessory rights guaranteed by the Federal Government.

Much later, in *United States v. Forness*, 125 F. 2d 928 (CA2), cert. denied, *sub nom. City of Salamanca v. United States*, 316 U. S. 694 (1942),⁸ the Government sued

⁷ In an earlier case, *New York ex rel. Cutler v. Dibble*, 21 How. 366 (1859), the Court had upheld New York statutes which protected the Indians from intrusion by others on their tribal lands, and had asserted that "[n]otwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion." *Id.*, at 370. It is apparent that by the later decision in *The New York Indians*, *supra*, the Court did not consider the potential implications of the dictum expressed in *Dibble* applicable in situations where the State's power was exercised other than for the protection of the Indians on their tribal lands. In any event, whatever *Dibble* may have held with respect to state power to protect Indian possession, it does not question the Indians' right to possession under federal law.

⁸ The question of the application of federal law to Indian tribal property in New York was litigated in the state courts in the intervening years as well. In 1870, an unreported decision of the New York Supreme Court held that tribal leases of Seneca reservation lands, ratified by the New York Legislature, were invalid in the absence of approval from the United States. See *United States v. Forness*, *supra*, at 930-931; H. R. Rep. Misc. Doc. No. 75, 43d

to set aside certain leases granted by the Seneca tribe on certain reservation lands. It was argued in opposition that the suit was merely an action for eject-

Cong., 2d Sess. (1875); Brief for the Warden and the State of New York 26-27, *New York ex rel. Ray v. Martin*, No. 158, O. T. 1945, 326 U. S. 496 (1946). In the mid-1890's in *Buffalo, R. & P. R. Co. v. Lavery*, 75 Hun. 396, 27 N. Y. S. 443 (5th Dept., App. Div. 1894), affirmed on opinion below, 149 N. Y. 576, 43 N. E. 986 (1896), a private non-Indian lessee of Indian land under a lease first granted by the Senecas in 1866, which was concededly not legally effective until an 1875 Act of Congress validated such leases, was nonetheless held to have priority over a railroad claiming under an 1872 lease from the Senecas and a state statute purportedly validating the lease as one to a railroad which had been ratified by a state court, because the state statute which would have given the railroad a superior right to possession was incapable of confirming possessory rights to Indian tribal lands without federal authority. The New York courts held that it was "not within the legislative power of the State to enable the Indian nation to make, or others to take from the Indians, grants or leases of lands within their reservations. In that matter the Federal government, having the power under the Constitution to do so, has assumed to control it by . . . act of Congress [referring to the Indian Nonintercourse Act]. . . . As respects their lands, subject only to the pre-emptive title, the Indians are treated as the wards of the United States, and it is only pursuant to the Federal authority that their lands can be granted or demised by or acquired by conveyance or leased from them." 75 Hun., at 399-400, 27 N. Y. S., at 445.

Still later, in *People ex rel. Cusick v. Daly*, 212 N. Y. 183, 105 N. E. 1048 (1914), the New York Court of Appeals held that without the consent of Congress New York could not prosecute Indian crimes on reservations. Relying on the classic federal cases, the court held that federal power was pre-eminent and that the Federal Government had made treaties with the Indians which confirmed their territorial possession, although the Federal Government never owned the fee of the land within the State's confines. *Id.*, at 192, 105 N. E., at 1050. Within the reservation federal power, when exercised, foreclosed the exercise of power by the State. "It is said that there is a difference between the Indians whose reservations are the direct gift of the Federal Government and those whose reservations have been derived from

ment which under state law could be defeated by a tender; but the Court of Appeals for the Second Circuit held that the Indian rights were federal and that "state law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because, as the court below recognized, state law does not apply to the Indians except so far as the United States has given its consent." *Id.*, at 932. There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law.⁹

the state or from other sources. We find no such distinction in the statute, and we can think of none that logically differentiates one from the other. Even if we assume that, in the absence of Federal legislation, the state has the most ample power to legislate for the Indians within its borders, there seems to be no escape from the conclusion that when Congress does act the power of the state must yield to the paramount authority of the Federal government." *Id.*, at 196-197, 105 N. E., at 1052.

⁹ Still later, federal authority over Indian lands was again challenged. In *Tuscarora Nation of Indians v. Power Authority*, 257 F. 2d 885 (1958), the Court of Appeals for the Second Circuit rejected New York's claim that the Nonintercourse Act did not apply to the State of New York and that, as one of the original 13 States, it never surrendered to the United States its power to condemn Indian lands. The Court of Appeals also held that the Act of Sept. 13, 1950, 64 Stat. 845, 25 U. S. C. § 233, whereby the United States ceded civil jurisdiction over Indian reservations to the State of New York, expressly and effectively excepted from its coverage the alienation of reservation lands, a matter over which the United States had reaffirmed its paramount authority. Nonetheless, the Court of Appeals held that the Niagara River Power Project Act, 71 Stat. 401 (1957), 16 U. S. C. §§ 836, 836a, by which Congress directed the Federal Power Commission to issue a license to the New York Power Authority for the construction and operation of a power

III

Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation, as was the case in *Gully v. First National Bank*, 299 U. S. 109 (1936). There, the suit was on a contract having its

project to utilize water made available to the United States by a 1950 treaty with Canada, constituted federal authorization for the Power Authority to exercise the right of eminent domain, but only in accordance with § 21 of the Federal Power Act, 41 Stat. 1074, 16 U. S. C. § 814, which permits the acquisition of sites for the purpose of developing waterways by the exercise of the right of eminent domain in the federal district court in which the land is located or in the state courts. Because the Power Authority had proceeded to appropriate a portion of the Tuscaroras' reservation lands by filing a map and other documents pursuant to procedures established by the State's Highway Law and Public Authorities Law, those proceedings were vacated and annulled. Subsequently, the Power Authority abandoned efforts to obtain possession of the land by appropriation pursuant to those statutes and instead proceeded by condemnation proceedings in the District Court for the Western District of New York. The Tuscaroras petitioned for review of the Court of Appeals decision, but the Court denied certiorari. 358 U. S. 841 (1958). The Superintendent of Public Works of the State of New York simultaneously appealed from it under 28 U. S. C. § 1254 (2), and the Court, on the Tuscaroras' subsequent suggestion of mootness, which the Power Authority supported and the Superintendent continued to oppose, and which was based on the Power Authority's abandonment of its appropriation proceedings in favor of the condemnation suit, vacated the Court of Appeals' judgment and remanded to the District Court with directions to dismiss the complaint as moot. 362 U. S. 608 (1960). See Records and Briefs in No. 384, O. T. 1958; Records and Briefs in No. 4, O. T. 1959.

genesis in state law, and the tax that the defendant had promised to pay was imposed by a state statute. The possibility that a federal statute might bar its collection was insufficient to make the case one arising under the laws of the United States.

Nor in sustaining the jurisdiction of the District Court do we disturb the well-pleaded complaint rule of *Taylor v. Anderson*, *supra*, and like cases.¹⁰ Here, the right to possession itself is claimed to arise under federal law in the first instance. Allegedly, aboriginal title of an Indian tribe guaranteed by treaty and protected by statute has never been extinguished. In *Taylor*, the plaintiffs were individual Indians, not an Indian tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands. See 32 Stat. 641. Individual patents had been issued with only the right to alienation being restricted for a period of time. Cf. *Minnesota v. United States*, 305 U. S. 382, 386 n. 1 (1939); *McKay v. Kalyton*, 204 U. S. 458 (1907). Insofar as the underlying right to possession is concerned, *Taylor* is more like those cases indicating that "a controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress." *Shulthis v. McDougal*, 225 U. S. 561, 570 (1912).¹¹ Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for "arising under" jurisdiction merely to allege that owner-

¹⁰ See, e. g., *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199 (1878); *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321 (1900); *Filhiol v. Maurice*, 185 U. S. 108 (1902); *Filhiol v. Torney*, 194 U. S. 356 (1904); *Joy v. City of St. Louis*, 201 U. S. 332 (1906); *White v. Sparkill Realty Corp.*, 280 U. S. 500 (1930).

¹¹ *Florida C. & P. R. Co. v. Bell*, *supra*, at 328-329; *Joy v. City of St. Louis*, *supra*, at 341-342.

ship or possession is claimed under a United States patent. *Joy v. City of St. Louis*, 201 U. S. 332, 342-343 (1906). As the Court stated in *Packer v. Bird*, 137 U. S. 661, 669 (1891):

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

For the same reasons, we think the complaint before us satisfies the additional requirement formulated in some cases that the complaint reveal a "dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis v. McDougal*, *supra*, at 569; *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203 (1878).¹² Here, the Oneidas assert a present right to possession based in part on their aboriginal right of occupancy which was not terminable except by act of the United States.

¹² *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 460 (1894); *Joy v. City of St. Louis*, *supra*, at 340.

Their claim is also asserted to arise from treaties guaranteeing their possessory right until terminated by the United States, and "it is to these treaties [that] we must look to ascertain the nature of these [Indian] rights, and the extent of them." *The New York Indians*, 5 Wall., at 768. Finally, the complaint asserts a claim under the Nonintercourse Acts which put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States. To us, it is sufficiently clear that the controversy stated in the complaint arises under the federal law within the meaning of the jurisdictional statutes and our decided cases.

IV

This is not to ignore the obvious fact that New York had legitimate and far-reaching connections with its Indian tribes antedating the Constitution and that the State has continued to play a substantial role with respect to the Indians in that State.¹³ There has been recurring tension between federal and state law; state authorities have not easily accepted the notion that federal law and federal courts must be deemed the controlling considerations in dealing with the Indians. *Fellows v. Blacksmith*, *The New York Indians*, *United States v. Forness*, and the *Tuscarora* litigation are sufficient evidence that the reach and exclusivity of federal law with respect to reservation lands and reservation Indians did not go unchallenged; and it may be that they are to some extent challenged here. But this only

¹³ For brief accounts of the New York experience with its Indians, see Federal Indian Law 965-979; Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buffalo L. Rev. 1 (1958); Brief for the Warden and the State of New York, *New York ex rel. Ray v. Martin*, No. 158, O. T. 1945, 326 U. S. 496 (1946).

underlines the legal reality that the controversy alleged in the complaint may well depend on what the reach and impact of the federal law will prove to be in this case.

We are also aware that New York and federal authorities eventually reached partial agreement in 1948 when criminal jurisdiction over New York Indian reservations was ceded to the State. 62 Stat. 1224, 25 U. S. C. § 232. In addition, in 1950 civil disputes between Indians or between Indians and others were placed within the jurisdiction of the state courts "to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State." 64 Stat. 845, 25 U. S. C. § 233.¹⁴ The latter statute, however, provided for the

¹⁴ Section 233 provides:

"Jurisdiction of New York State courts in civil actions.

"The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided*, That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further*, That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom:

preservation of tribal laws and customs and saved Indian reservation lands from taxation and, with certain exceptions, from execution to satisfy state court judgments. Furthermore, it provided that nothing in the statute "shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York" or as "conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952." The Senate report on the bill disclaimed any intention of "impairing any of their property or rights under existing treaties with the United States." S. Rep. No. 1836, 81st Cong., 2d Sess., 2 (1950). Under the penultimate proviso the matter of alienating tribal reservation lands would appear to have been left precisely where it was prior to the Act.¹⁵ Moreover, the final proviso of the statute

Provided further, That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further*, That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further*, That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."

¹⁵ "The text and history of the new legislation are replete with indications that congressional consent is necessary to validate the

negating the application of state law with respect to transactions prior to the adoption of the Act was added by amendment on the floor of the Senate, and its purpose was explained by the gentleman who offered it to be as follows:

"Mr. Chairman, I do not think there will be any objection from any source with regard to this particular amendment. This just assures the Indians of an absolutely fair and impartial determination of any claims they might have had growing out of any relationship they have had with the great State of New York in regard to their lands.

"I think there will be no objection to that; they certainly ought to have a right to have those claims properly adjudicated. . . .

exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation and that negatives any authorization of 'the alienation from any Indian nation, tribe, or band of Indians of any land within any Indian reservation in the State of New York.' The Senate Committee's report on that law emphasizes that 'State law does not apply to Indians except so far as the United States has given its consent' and points out that the law provides that 'no lands within any reservation be alienated.' During the congressional hearings, most Indian leaders continued to oppose the bills, partly because of fear of state attempts to deprive them of their reservations, despite the New York Joint Committee's repeated assurances. Accordingly, New York's representatives once more disavowed any intention to break up the reservations and, more clearly than some state officials in the history of the controversy, disclaimed any state power to do so. Moreover, both federal and state officials agreed that the bills would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue." Gunther, *supra*, n. 13, 8 Buffalo L. Rev., at 16. (Footnotes omitted.)

"In addition thereto, of course, they may go into the Federal courts and adjudicate any differences they have had between themselves and the great State of New York relative to their lands, or claims in regard thereto, and I am sure that the State of New York should have and no doubt will have, no objection to such provision." 96 Cong. Rec. 12460 (1950) (remarks of Congressman Morris).

Our conclusion that this case arises under the laws of the United States is, therefore, wholly consistent with and in furtherance of the intent of Congress as expressed by its grant of civil jurisdiction to the State of New York with the indicated exceptions.¹⁶

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, concurring.

The majority opinion persuasively demonstrates that the plaintiffs' right to possession in this case was and is rooted firmly in federal law. Thus, I agree that this is not a case which depends for its federal character solely on possible federal defenses or on expected responses to

¹⁶ Because of our determination that the complaint states a controversy arising under the laws of the United States sufficient to invoke the jurisdiction of the District Court under §§ 1331 and 1362, in accordance with prior decisions of this Court, we have no occasion to address and do not reach the contention pressed by petitioners that the Congress, in enacting § 1362 in 1966, 80 Stat. 880, intended to expand the scope of "arising under" jurisdiction in the District Courts, beyond what judicial interpretations of that language have allowed under § 1331, for that category of suits brought by Indian tribes, in addition to eliminating the amount in controversy requirement when Indian tribes sue.

possible defenses. I also agree that the majority decision is consistent with our decision in *Gully v. First National Bank*, 299 U. S. 109 (1936). However, I think it worthwhile to add a brief concurrence to emphasize that the majority opinion does not disturb the long line of this Court's cases narrowly applying the principles of 28 U. S. C. § 1331 and the well-pleaded complaint rule to possessory land actions brought in federal court.

As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in *Taylor v. Anderson*, 234 U. S. 74 (1914). Thus the complaint must be judged according to the rules applicable to such cases.

The federal courts have traditionally been inhospitable forums for plaintiffs asserting federal-question jurisdiction of possessory land claims. The narrow view of the scope of federal-question jurisdiction taken by the federal courts in such cases probably reflects a recognition that federal issues were seldom apt to be dispositive of the lawsuit. Commonly, the grant of a land patent to a private party carries with it no guarantee of continuing federal interest and certainly carries with it no indefinitely redeemable passport into federal court. On the contrary, as the majority points out, the land thus conveyed was generally subject to state law thereafter.

Thus, this Court's decisions have established a strict rule that mere allegation of a federal source of title does not convert an ordinary ejectment action into a federal case. As the Court noted in *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 507 (1900), "a suit to enforce a right which takes its origin in the laws of the United

States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses, for if it did every action to establish title to real estate (at least in the newer States) would be such a one, as all titles in those States come from the United States or by virtue of its laws." This rule was even applied to cases in which land grants to Indians, subject to limited restrictions on alienation, were involved. See *Taylor, supra*.

The majority today finds this strict rule inapplicable to this case, and for good reason. In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather the Federal Government has shown a continuing solicitude for the rights of the Indians in their land. The Nonintercourse Act of 1790 manifests this concern in statutory form. Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility.

The opinion for the Court today should give no comfort to persons with garden-variety ejectment claims who, for one reason or another, are covetously eyeing the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor tomorrow as today.

